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IN

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

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No. 443

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

EFROIM SPECTOR

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

FILED NOVEMBER 23, 1951

PROBABLE JURISDICTION NOTED JANUARY 2, 1952

# SUPREME COURT OF THE UNITED STATES

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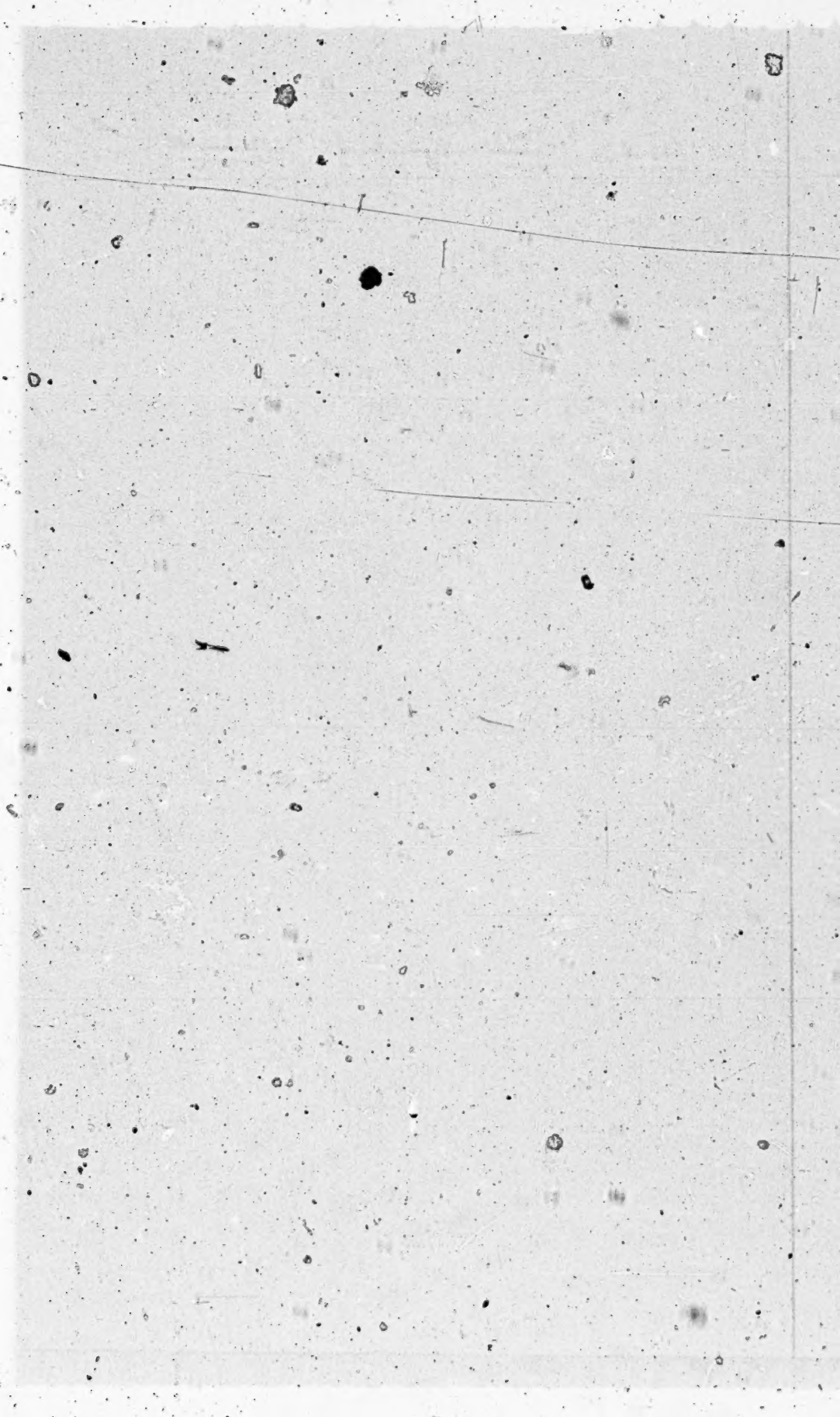
INDEX


| | Original | Print |
|---|---|---|
| Record from U.S.D.C. for the Southern District of California | 2 | 1 |
| Indictment | 2 | 1 |
| Notice of motion to dismiss indictment | 7 | 3 |
| Motion to dismiss indictment | 8 | 3 |
| Affidavit of Efroim Spector | 12 | 6 |
| Memorandum of decision | 16 | 8 |
| Judgment of dismissal | 26 | 13 |
| Notice of appeal (omitted in printing) | 28 | |
| Statement pursuant to Rule 12, paragraph 2 of the Rules of the Supreme Court (omitted in printing) | 43 | |
| Designation of record on appeal (omitted in printing) | 45 | |
| Supplemental notice of appeal | 47 | 13 |
| Supplemental designation of record on appeal (omitted in printing) | 49 | |
| Docket entries | 52 | 14 |
| Clerk's certificate (omitted in printing) | 54 | |
| Statement of points to be relied upon and designation of record | 55 | 15 |
| Order noting probable jurisdiction | 57 | 16 |



1-2 In the United States District Court in and for the Southern District of California, Central Division

February, 1951, Grand Jury

No. 21844 CD

UNITED STATES OF AMERICA, PLAINTIFF

v.

EFROIM SPECTOR, DEFENDANT

INDICTMENT—Filed July 3, 1951

[U.S.C., Title 8, Sec. 156(c)—Failure to depart United States after order of deportation]

The grand jury charges:

COUNT ONE

[U.S.C., Title 8, Sec. 156(c)]

(1) Defendant EFROIM SPECTOR is an alien who entered the Port of New York, New York, on or about August 13, 1913, from Russia, and against whom an Order of Deportation is outstanding under the provisions of United States Code, Title 8, Section 137, said order having been entered on or about August 13, 1930, by reason of his having been found in the United States in violation of said act of Congress in that the defendant believes in, advises, advocates, and teaches the overthrow by force or violence of the Government of the United States; is a member of an organization, association, society, and group that believes in, advises, advocates, and teaches the overthrow by force or violence of the Government of the United States; and is a member of an organization, association, society, and group that writes, circulates, distributes, prints, publishes, and displays written and printed matter advising, advocating, and teaching the overthrow by force or violence of the Government of the United States, and, pursuant to said Order of Deportation, was required to depart from the United States during the period of six months from September 23, 1950; and

3 (2) During the period of six months from September 23, 1950, the defendant did wilfully fail to depart from the United States and during said period and thereafter remained in Los Angeles County, California, within the Central Division of the Southern District of California.

4

COUNT TWO

[U.S.C., Title 8, Sec. 156(c)]

The grand jury realleges all of the allegations of the first count of this indictment except those contained in paragraph (2) thereof; and alleges:

During the period of six months from September 23, 1950, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant EFROIM SPECTOR did wilfully fail to make timely application in good faith for travel or other documents necessary to his departure from the United States.

5

COUNT THREE

[U.S.C., Title 8, Sec. 156(c)]

The grand jury realleges all of the allegations of the first count of this indictment except those contained in paragraph (2) thereof and alleges:

During the period of six months from September 23, 1950, defendant EFROIM SPECTOR did wilfully refuse to depart from the United States and during said period and thereafter remained in Los Angeles County, California, within the Central Division of the Southern District of California.

6

COUNT FOUR

[U.S.C., Title 8, Sec. 156(c)]

The grand jury realleges all of the allegations of the first count of this indictment except those contained in paragraph (2) thereof and alleges:

During the period of six months from September 23, 1950, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant EFROIM SPECTOR did wilfully refuse to make timely application in good faith for travel or other documents necessary to his departure from the United States.

A True Bill.

ROBERT B. YOUNG III,
*Foreman.*

ERNEST A. TOLIN,
*United States Attorney.*

[File endorsement omitted.]

7 In United States District Court

No. 21844 CD

[Title omitted]

NOTICE OF MOTION TO DISMISS INDICTMENT—Filed July 18, 1951

To the United States of America, Plaintiff, and to Ernest A. Tolin, United States Attorney, its attorney:

You will please take notice that the defendant herein will, on July 19, 1951, at 1:30 o'clock P.M., or as soon thereafter as counsel may be heard, in the courtroom of the Honorable William Mathes, Judge of the above entitled court, in the Federal Building, at Los Angeles, California, bring on for hearing by said court, pursuant to order, his motion to dismiss the indictment herein, filed herewith.

MARGOLIS AND MCTERNAN,
By BEN MARGOLIS,
*Attorneys for Defendant.*

[File endorsement omitted.]

8 [File endorsement omitted]

In United States District Court

[Title omitted]

MOTION TO DISMISS INDICTMENT—Filed July 18, 1951

The defendant moves that the indictment herein be dismissed upon the following grounds:

I

The indictment and each count thereof fail to state facts sufficient to constitute an offense against the United States.

II

The indictment seeks to deny to defendant the right granted him under law to take any proper steps for the purpose of securing cancellation of or exemption from the order of deportation of defendant, and the indictment is void as contrary to law and to declared public policy.

III

Section 20(c) of the Immigration Act of February 5, 1917, as amended (8 U.S.C., 156), the statute under which the indictment is

drawn, is unconstitutional and void on its face and as applied
9 to the defendant in the following respects:

(a) That in imposing said requirements upon plaintiff more than twenty years subsequent to the issuance and service of said warrant of deportation dated August 13, 1930, said Act is an ex post facto law repugnant to Article I, Section 9, cl. 3 of the Constitution of the United States.

(b) That in requiring plaintiff to effect his own deportation under said warrant of deportation dated August 13, 1930 on pain of conviction of a felony and imprisonment for up to ten years for willful failure or refusal, said Act constitutes and imposes cruel and unusual punishment upon plaintiff in violation of the Eighth Amendment to the Constitution of the United States.

(c) That in compelling plaintiff to effect and execute said warrant of deportation against himself, said Act denies to plaintiff due process of law in violation of the Fifth Amendment to the Constitution of the United States.

IV

Counts One and Three of the indictment state the same purported offense and the indictment thereby purports to charge the defendant twice for the same offense.

V

Counts Two and Four of the indictment state the same purported offense and the indictment thereby purports to charge the defendant twice for the same offense.

VI

The indictment in Count One thereof is uncertain in that it cannot be determined therefrom:

(a) By what act or acts it is claimed that defendant willfully failed to depart from the United States as alleged.

(b) When and on what date or dates it is claimed that such act or acts occurred.

(c) Where it is claimed that such act or acts occurred.

10 (d) In what respects it is claimed that such refusal was willful.

VII

The indictment in Count Three thereof is uncertain in that it cannot be determined therefrom:

(a) By what act or acts it is claimed that defendant willfully refused to depart from the United States as alleged.

(b) When and on what date or dates it is claimed that such act or acts occurred.

(c) Where it is claimed that such act or acts occurred.

(d) In what respects it is claimed that such refusal was willful.

VIII

The indictment in Count Two thereof is uncertain in that it cannot be determined therefrom:

(a) By what act or acts it is claimed that defendant willfully failed to make timely application in good faith for travel or other documents necessary to his departure from the United States as alleged.

(b) When and on what date or dates it is claimed that such act or acts occurred.

(c) Where it is claimed that such act or acts occurred.

(d) In what respects it is claimed that such refusal was willful.

IX

The indictment in Count Four thereof is uncertain in that it cannot be determined therefrom:

(a) By what act or acts it is claimed that defendant willfully refused to make timely application in good faith for travel or other documents necessary to his departure from the United States as alleged.

11

X

The indictment is uncertain in that it fails to allege:

(a) The country of origin of the defendant.

(b) The country to which the defendant was ordered deported as alleged.

(c) Whether such country or either of them is willing to receive the defendant upon expulsion from the United States.

(d) Whether such country or either of them has issued or will issue travel documents to effectuate defendant's departure from the United States.

(e) Whether application by defendant to such country for travel or other documents would have resulted in the issuance of the same.

XI

The indictment fails to allege that the defendant is deportable to any country whatever and further fails to allege that the defendant could gain admittance to any country.

Said motion is based upon the attached affidavit of the defendant, Frank Efroim Spector, the attached memorandum of points and authorities and all of the other records and files herein.

MARGOLIS AND MCTERNAN,
By BEN MARGOLIS,
*Attorneys for Defendant.*

12 [File endorsement omitted]

AFFIDAVIT OF EFROIM SPECTOR IN SUPPORT OF MOTION TO DISMISS INDICTMENT—Filed July 18, 1951

STATE OF CALIFORNIA,
County of Los Angeles, ss:

EFROIM SPECTOR, also known as Frank Spector, being first duly sworn, deposes and says:

That he is the defendant in the above entitled proceeding.

That he has been a resident of the United States continuously since 1913 and of the State of California continuously except for limited absences since 1920; that he is married, is the father of a native-born daughter and that his daughter is the mother of children born in the United States.

That sometime in 1928 on a date which he does not now recall, affiant was served with a warrant of arrest for deportation issued or caused to be issued by the Secretary of Labor; that pursuant to such warrant of arrest, hearings to determine affiant's deportability were conducted under the authority of the Secretary of Labor in November, 1928 and in April and July 1930; that following
13 the conclusion of such hearings an order directing affiant's deportation to the Union of Soviet Socialist Republics was issued by or under the authority of the Secretary of Labor on August 13, 1930.

That deportation under said order of August 13, 1930, has never been effectuated or carried out; that affiant is informed and believes and on the basis of such information and belief states that no proceedings looking toward the execution of said deportation order were conducted or attempted by the Department of Labor or, following the transfer of the Immigration and Naturalization Service to the Department of Justice, by the Attorney General, between August 13, 1930 and on or about December 1, 1940. That at all times from August 13, 1930 until March 8, 1950 affiant was at liberty upon his own recognizance. That on or about March 8, 1950 affiant was required by the District Director of the Immigration and Naturalization Service at Los Angeles, California, to post bond in the sum of $5,000.00 to secure his future appearance at any proceedings under said deportation order, and that bond in such amount was then and

there posted in affiant's behalf and at all times since said date has been and now is in full force and effect.

That the only proceedings of any kind in connection with affiant's status of which affiant has knowledge since the issuance of said deportation order of August 13, 1930, have consisted of efforts by affiant during World War II to obtain United States citizenship by naturalization; that in connection therewith affiant in or about the year 1945 filed with the Board of Immigration Appeals of the Department of Justice a motion to vacate the said deportation order and said motion on July 23, 1945 was denied by said Board. That in 1942 affiant made repeated efforts to enlist in the armed forces of the United States and was in each instance rejected for military service solely, as affiant is informed and believes, on account of his age.

14 That on or about January 17, 1951 affiant by counsel moved the Board of Immigration Appeals of the Department of Justice for an order vacating the deportation order of August 13, 1930 and dismissing the deportation proceedings against him upon the ground that the same were and are *functus officio* and without force or effect; affiant also requested opportunity for oral argument upon said motion before the said Board. That on February 8, 1951 affiant by counsel was notified in writing that such motion, together with his request for oral argument thereof, had been denied by the said Board of Immigration Appeals.

That on February 26, 1951 and on March 8, 1951 affiant by counsel addressed letters to the Commissioner of Immigration and Naturalization at the offices of the Commissioner in Washington, D. C., requesting information as to what other steps, if any, might be taken by affiant within the Immigration and Naturalization Service or the Department of Justice to challenge and determine the validity of said deportation order of August 13, 1930; that neither of said letters has ever been acknowledged by the Commissioner or anyone on his behalf.

That in the absence of information or advice from the Commissioner of Immigration and Naturalization as to such action as he might take for the purpose of securing cancellation of said deportation order of August 3, 1930, affiant on or about March 22, 1951 filed in this court a civil action for a declaration as to the validity of said deportation order and for an injunction restraining the District Director of Immigration and Naturalization at Los Angeles, California, pending such declaratory judgment, from proceeding to enforce said order against affiant. That said action is entitled Frank Spector, plaintiff, vs. H. R. Landon, District Director, Los Angeles District, Immigration & Naturalization Service, Defendant, and is numbered 12961-HW in this Court. That said

action at all times since on or about March 22, 1951 has been
15 and now is on file and pending in this Court and that pursuant to stipulation the defendant therein has until July 13, 1951 to appear, answer, or otherwise plead to said complaint.

That affiant came to the United States to make his home in 1913. That affiant has lived in the United States throughout his young manhood and his adult life and knows and remembers no other home. That affiant at all times since coming to the United States has considered this country as his own and has never owed nor offered allegiance to any other nation. That in attempting to procure an order vacating the said deportation order of August 13, 1930 and in filing the said civil action in this court, affiant intended and intends in good faith to secure cancellation of said order of deportation so that affiant may remain in the United States and live out his life here.

EFROIM SPECTOR also known as Frank Spector.

Subscribed and sworn to before me this 17th day of July, 1951.

[SEAL.] MARY L. ROSENFIELD,
*Notary Public in and for the County of Los Angeles, State of California.*

My Commission Expires Jan. 15, 1955.

16 [File endorsement omitted]

In United States District Court

[Title omitted]

MEMORANDUM OF DECISION—Filed September 12, 1951

Defendant stands indicted for alleged violations of those provisions of § 23 of the Internal Security Act of 1950 [64 Stat. —, 8 U.S.C. § 156(c)] which declare that:

"Any alien against whom an order of deportation is outstanding . . . who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or from September 23, 1950, whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure . . . shall upon conviction
17 be guilty of a felony, and shall be imprisoned not more than ten years. . . ."

The indictment contains four counts averring that defendant is an alien against whom an order of deportation entered August 13,

1930 is outstanding, and that "during the period of six months from September 23, 1950," defendant did willfully "fail to depart from the United States" [Count 1]; "fail to make timely application in good faith for travel or other documents necessary to his departure from the United States" [Count 2]; "refused to depart from the United States" [Count 3]; and "refused to make timely application in good faith for travel or other documents necessary to his departure from the United States" [Count 4].

Defendant moves to dismiss the indictment. In support of the motion he urges the above-quoted provisions of § 23 of the Act must be held unconstitutional [see *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886); *Wong Wing* v. *United States*, 163 U.S. 228, 238 (1896)] upon the grounds inter alia that the statute denies the defendant due process of law [U. S. Const. Amend. V], is an ex post facto law [U. S. Const. Art. I, § 9], and imposes cruel and unusual punishment [U. S. Const. Amend. VIII].

18 In "The Chinese Exclusion Case" [*Chae Chan Ping* v. *United States*, 130 U.S. 581, 606-607; 609 (1889)], the Supreme Court said: "The power of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied . . . the power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States. . . ."

Later in *Fong Yue Ting* v. *United States*, 149 U.S. 698, 707 (1893), the Court declared that:

> "The right of a nation to expel or deport foreigners . . . rests upon the same grounds and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."

The statute at bar was enacted in exercise of this inherent right of sovereignty. The Congress in effect has ordered all aliens against whom an order of deportation is outstanding to depart from this country within a specified period, and provided for the punishment of any who willfully fail or refuse "to depart" or "to make timely application . . . for travel or other documents necessary to . . . departure." [8 U.S.C. §156(c).]

Defendant asserts that this congressional enactment "is so vague and indefinite that it fails to give due notice of what it punishes" and hence falls within the constitutional prohibition of the
19 Fifth Amendment that "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

The due process clause of the Fifth Amendment requires that "criminal statutes . . . give due notice that an act has been made criminal before it is done . . ." [*Jordan* v. *DeGeorge*, 341 U.S.

223, 230 (1951)] because "Every man should be able to know with certainty when he is committing a crime" [*United States* v. *Reese*, 92 U.S. 214, 220 (1875)]. Hence "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." [*Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926).]

If challenged as repugnant to the due process clause of the Fifth Amendment, a statute must be tested "on its face"; for it is "the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." [*Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939); *United States* v. *Petrillo*, 332 U.S. 1, 6-7 (1947); cf. *Dennis* v. *United States*, 341 U.S. 494, 515 (1951) (opinion of Vinson, C.J.).]

20 First challenged by defendant are those provisions of § 23 of the Internal Security Act of 1950 [64 Stat. —, 8 U.S.C. § 156(c)] which declare guilty of a felony "any alien against whom an order of deportation is outstanding, . . . who shall willfully fail or refuse to depart from the United States within a period of six months from . . . September 23, 1950."

I find in this language no uncertainty "which deprives a person of the ability to predetermine whether a contemplated action (omission) is criminal under the provisions of this law." [*Gorin* v. *United States*, 312 U.S. 19, 27 (1941); *id.* at 27, n. 13.] The act commanded to be done, the identity of the group subject to the command, and the time limit for performance, all are clear and specific. That part of the statute which serves as the basis for the first and third counts of the indictment must therefore be held to meet fully the constitutional requirement of certainty within the "due process" clause of the Fifth Amendment.

Next to be considered are the provisions of § 23 declaring guilty of a felony "any alien against whom an order of deportation is outstanding . . . who shall willfully fail or refuse . . . to make timely application in good faith for travel or other documents necessary to his departure. . . ." This portion of the statute is involved in the second and fourth counts of the

21 indictment.

Assuming that "timely application" means an application made early enough to enable the alien "to depart from the United States within a period of six months from the date of . . . order of deportation, or from September 23, 1950, whichever is later" [see 8 U.S.C. § 156(c)], the questions remain (1) for what and (2) to whom shall the application be made.

The statute merely provides that timely application be made "for travel or other documents necessary to his departure." Would "timely" purchase of a Sunday bus ticket to Tijuana across

the Mexican border suffice? Or would it be necessary to obtain more formal "travel or other documents necessary to . . . departure" in order to avoid criminality?

If it be assumed the "travel or other documents" referred to must mean passports, visas, permits or the like, there still remains the question whether the statute commands the alien to make "timely application" therefor to only one foreign country, or to all foreign countries maintaining consulates in the city, county and state of the alien's residence, or to all embassies and consulates in the nation's capital. [See *United States* v. *Evans*, 333 U.S. 483, 486-488, 495 (1948).]

22 Elaboration seems surplusage. This part of § 23 commands the alien "to determine his conduct not . . . by reference to knowable criteria, but by . . . conjecture. . . ." [*Collins* v. *Kentucky*, 234 U.S. 634, 638 (1914).]

Where a criminal statute forbids affirmative action, one in doubt as to precisely what is forbidden can escape a charge of criminality by avoiding all conduct closely resembling the uncertain acts so forbidden. [See *United States* v. *Petrillo*, *supra*, 332 U.S. at 5-8; *United States* v. *Alford*, 274 U.S. 264, 267 (1927); *Omaechevarria* v. *Idaho*, 246 U.S. 343, 348 (1918).] But even that method of compliance is not available where the statute makes criminal an omission or failure to act. For a statute prohibiting an omission is in effect a law commanding action; and no one can foretell compliance unless the command be reasonably specific.

So if specificity be essential to due process, and hence to the constitutionality of criminal statutes forbidding affirmative action [see *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, 89 (1921); *Stromberg* v. *California*, 283 U.S. 359, 369 (1931); *Herndon* v. *Lowry*, 301 U.S. 242, 261-264 (1937)], statutes making criminal an omission should a multo fortiori specifically declare what action is required for compliance, to the end that all may know precisely what affirmative conduct is required to avoid commission of
23 a crime. [See *Screws* v. *United States*, 325 U.S. 91 (1945).]

The government however points to the fact that § 23 specifies one must "willfully" fail or refuse to perform the acts commanded in order to commit the offense, and urges that despite any indefiniteness in language the provisions in question give due notice of conduct made criminal because "punishment is imposed only for a neglect of duty knowingly omitted with the purpose of omitting that which the statute requires." But again, although the element of wilfulness may compensate for some lack of specificity in a criminal statute forbidding affirmative acts [see *Williams* v. *United States*, 341 U.S. 97, 101 (1951); *Communications Ass'n* v. *Douds*, 339 U.S. 382, 413 (1950); *Screws* v. *United States*, *supra*, 325 U.S. at 101; *United States* v. *Ragen*, 314 U.S. 513, 524 (1942);

*Omaechevarria* v. *Idaho*, *supra*, 246 U.S. at 348], it can serve no such purpose where as here the statute condemns inaction and constitutes in effect a command to do some vague and indefinite act or series of acts.

Since all are entitled to be informed—indeed are presumed to know—what the law forbids and what the law commands [*Hamburg-American Line* v. *United States*, 291 U.S. 420, 426 (1934)], the law should not "lag behind common sense." [*Ludecke* v. *Watkins*, 335 U.S. 160, 166-167 (1948).] And common sense as well as our concept of due process of law dictate that standards of proscribed conduct be even more definite where the conduct forbidden is an omission. [See *Viereck* v. *United States*, 318 U.S. 236, 241-243, 245 (1943).]

The provisions of § 23 of the Internal Security Act of 1950 [64 Stat. —, 8 U.S.C. § 156(c)] upon which the second and fourth counts of the indictment are based must therefore be held to be too vague and uncertain to meet the essential requirements of due process of law within the Fifth Amendment.

Defendant's remaining contentions of unconstitutionality cannot be sustained. In view of the nation's inherent right to expel and deport aliens [*Fong Yue Ting* v. *United States*, *supra*, 149 U.S. at 707], punishing those against whom an order of deportation is outstanding who "willfully fail or refuse to depart" [8 U.S.C. § 156(c)] is clearly not a violation of due process. Nor is maximum punishment of ten years imprisonment for such an offense "cruel and unusual" within the meaning of the constitutional limitation. [U. S. Const. Amend. VIII; *Becker* v. *United States*, 91 F. 2d 550 (9th Cir. 1937); *United States* v. *Sorcey*, 151 F. 2d 899, 902-903 (7th Cir. 1945); *cert. denied* 327 U.S. 794 (1946); cf. *Weems* v. *United States*, 217 U.S. 349 (1910).] And since the conduct proscribed by the provision "willfully fail or refuse to depart" is only such as occurs more than six months after the date of the enactment of the statute [see 8 U.S.C. § 156(c)], it is not an "ex post facto Law." [U. S. Const. Art. I, § 9; *Garner* v. *Los Angeles Board*, 341 U.S. 716, 721 (1951).]

Defendant urges dismissal upon the further ground that the third and fourth counts of the indictment charge the same offenses as the first and second counts. It is permissible to charge a single offense in different ways and separate counts, but upon conviction punishment may be imposed only for a single offense. [See *Barnes* v. *United States*, 142 F. 2d 648, 650 (9th Cir 1944); *United States* v. *Bent*, 175 F. 2d 397, 400 (8th Cir. 1949); Fed. R. Cr. P. 8(a); 2 Wharton's Criminal Evidence § 1033 (11th ed. 1935); cf. *Catrino* v. *United States*, 176 F. 2d 884, 888 (9th Cir. 1949).]

For the reasons stated defendant's motion to dismiss should be and is hereby granted as to the second and fourth counts of the indictment and denied as to the first and third counts.

September 12, 1951.

WM. C. MATHES,
*United States District Judge.*

26 In United States District Court

UNITED STATES OF AMERICA, PLAINTIFF

*vs.*

EFROIM SPECTOR, DEFENDANT

JUDGMENT OF DISMISSAL (As to Counts 2 and 4)—Filed October 15, 1951

The defendant having filed his motion to dismiss the indictment herein, and the court having prepared and filed on September 12, 1951, a memorandum of decision, and for the reasons therein stated;

It is hereby ordered and adjudged that the defendant's motion to dismiss be granted as to Counts 2 and 4 of the indictment, and denied as to Counts 1 and 3 of the indictment.

It is further ordered and adjudged that Counts 2 and 4 of the indictment herein be, and the same are, hereby dismissed.

It is further ordered that this judgment of dismissal be entered nunc pro tunc as of September 12, 1951.

Dated this 15th day of October, 1951.

WM. C. MATHES,
*United States District Judge.*

Presented by:
RAY H. KINNISON,
*Assistant U. S. Attorney,*
*Chief of Criminal Division.*

[File endorsement omitted.]

27-42 AFFIDAVIT OF SERVICE BY MAIL (omitted in printing).

43-46 STATEMENT PURSUANT TO RULE 12, PARAGRAPH 2 OF THE RULES OF THE SUPREME COURT (omitted in printing).

47 In United States District Court

[Title omitted]

SUPPLEMENTAL NOTICE OF APPEAL—Filed October 19, 1951

The United States hereby appeals to the Supreme Court of the United States from the order and judgment of the United States

District Court for the Southern District of California, entered September 12, 1951, dismissing counts 2 and 4 of the indictment against defendant, which charged him with violations of that portion of Section 20(c) of the Act of February 5, 1917, as amended by Section 23 of the Internal Security Act of 1950, which imposes criminal penalties against an alien who has been ordered deported and who willfully fails or refuses to make timely application in good faith for travel or other documents necessary to his departure.

Dated: October 19, 1951.

ERNEST A. TOLIN,
*United States Attorney.*
WALTER S. BINNS,
*Chief Assistant U. S. Attorney.*
RAY H. KINNISON,
*Assistant U. S. Attorney,*
*Chief of Criminal Division.*
ANGUS D. MCEACHEN,
*Assistant U. S. Attorney*

[File endorsement omitted.]

48-51 AFFIDAVIT OF SERVICE BY MAIL (omitted in printing).

52 In United States District Court

[Title omitted]

8—156(c)

FAILURE TO DEPART U. S. AFTER ORDER OF DEPORTATION

DOCKET ENTRIES

| *Date* | *Proceedings* | *Clerk's Fee* |
|---|---|---|
| Jul. 3, 1951 | Ent. Ord. for Flg. Indict. & Issuance B/W—Bond $15,000. Fld. Indict.—Issd B/W—MD JS-2.—Plaintiff, $15.00. | |
| 7-6-51 | Ent procs on & ent ord that bond in 21844-Crim. is suff. & upon giving it in manner & form as made on the stip htf fld, dft released from custody; issd abstr US Mar & fld recpt. (M) | |
| 7-6-51 | Fld Stip. for Cash Deposit, with approval of Judge McCormick thereon, & deposited $15,000 2½% US Treas. bonds. Issd abstr US Mar. | |
| 7-9-51 | Fld Design. of Counsel & Appear Prae Margolis & McTernan, by Ben Margolis, Atty for deft. Ent procs on ARR, T/N, a/k/a Frank Spector; ord fur procs be carried on in those names. Ent ord contg to 7-19-51 1:30PM for plea & to hear mots. deft | |
| 53 | desires to present. Mot. & authorities to be fld by 7-16-51 & U.S. author. to be fld by 7-18-51. (WM) | |

7-18-51. Fld Mot. to Dism; Not. of Mot. retble 7-19-51 1:30 PM: affid. of dft Spector in Suppt. of Mot. to Dism.; Mot. for B/P and Not. of Mot. retble 7-19-51 1:30 PM, & Memo Pts. & Auths. in suppt. of Mot. to Dism. & for B/P.

7-19-51. Ent procs on hrg Mot to Dism. & ent ord contg to 7-24-51 1:30P.M. for fur hrg & to hear mot for B/P & for plea. (WM) Fld. B/W-Retn. Execu.

7-24-51. Ent procs on fur hrg on Mot. to Dismiss & mot for B/P; ent ord submitg on briefs to be fld 10x10x5; U.S. to file first brief. (WM)

8-2-51. Fld. Govt's. Brief.

8-14-51. Fld Dft's Reply Brief in Suppt. of Mot. to Dismiss Indict. (U.S. Attys served)

8-27-51. Fld Govt's. Reply Brief.

10-12-51. Fld Memo. of Decision by Judge Mathes grntg. Mot. to Dismiss Cts. 2 & 4, & denyg. as to Cts. 1 & 3. Notif. Attys & Amicus Curiae & mld copy to Atty. Gen.

10-12-51. Fld Govt's. Notice of Appeal to the Supreme Court from Ord. ent 9-12-51 dismissg. Cts. 2 & 4 of Indict. with affid. of Serv. by Mail thereon. Fld Stmt as to Juris; fld Notif. to deft of appeal; fld Design. of Record on Appeal, each with Affid. of Service by Mail thereon. Plaintiff, $5.00.

10-15-51. Fld Judgment of Dismissal as to Counts 2 & 4, nun pro tunc as of 9-12-1951. (WM)

10-19-51. Fld Govt's. Suppl. Notice of Appeal; Fld Suppl. Design. of Record on Appeal.

54 Clerk's Certificate to foregoing transcript omitted in printing.

55-56 In the Supreme Court of the United States, October Term, 1951

[Title omitted]

On Appeal from the United States District Court for the Southern District of California

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF RECORD—Filed December 20, 1951

Pursuant to Rule 13, paragraph 9, of this Court, appellant states that it intends to rely upon the following points:

1. The District Court erred in holding that the portion of Section 20(c) of the Act of February 5, 1917, as amended by Section 23 of the Internal Security Act of 1950, 8 U.S.C. 156(c), which

provides criminal penalties against an alien, ordered deported for advocating the overthrow of the Government by force and violence, who shall "willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure," is unconstitutionally vague and indefinite.

2. The District Court erred in granting the motion to dismiss counts 2 and 4 of the indictment.

Appellant deems the entire record as filed in the above-entitled case, with the exception of the first notice of appeal and designation of record, necessary for the consideration of the points relied upon.

PHILIP B. PERLMAN,
*Solicitor General.*

December 20, 1951.

57 Supreme Court of the United States, October Term, 1951

No. 443

[Title omitted]

ORDER—January 2, 1952

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

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NO. 443

# In the Supreme Court of the United States

OCTOBER TERM, 1951.

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THE UNITED STATES OF AMERICA, *Appellant*,

v.

ETROM SPECTOR.

---

Appeal from the United States District Court for the Southern District of California.

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## STATEMENT AS TO JURISDICTION.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

---

No. 21844 CR

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UNITED STATES OF AMERICA

v.

EFROIM SPECTOR.

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## STATEMENT AS TO JURISDICTION

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In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, and Rule 37(a) of the Federal Rules of Criminal Procedure, the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order of the District Court in this cause dismissing the indictment.

### OPINION BELOW

The opinion of the District Court dismissing the indictment has not been reported. A copy thereof is attached hereto as an appendix.

## JURISDICTION

The order of the District Court dismissing the indictment was entered September 12, 1951. The jurisdiction of the Supreme Court to review on direct appeal an order of a District Court dismissing an indictment, where such dismissal is based on the unconstitutionality of the statute on which the indictment is founded, is conferred by the Criminal Appeals Act, 18 U.S.C. 3731. See also Rules 37(a)(2), F. R. Crim. P.

## QUESTION PRESENTED

Whether that portion of Section 20(c) of the Act of February 5, 1917, as amended by Section 23 of the Internal Security Act of 1950, 8 U.S.C. 156(c), which provides criminal penalties against an alien, ordered deported for advocating the overthrow of the Government by force and violence, who shall within six months after the effective date of the Internal Security Act "willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure" is sufficiently definite to meet constitutional standards of due process.

## STATUTE INVOLVED

Section 20(c) of the Act of February 5, 1917, as amended by Section 23 of the Internal Security Act of 1950, chapter 1024, 64 Stat. 1010, 8 U.S.C. 156(c), provides, in pertinent part, as follows:

> Any alien against whom an order of deportation is outstanding under * * *(4) so much of section 19 of the Immigration Act of 1917, as amended * * * as relates to criminals, prosti-

tutes, procurers, or other immoral persons, anarchists, subversives and similar classes, who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or, from September 23, 1950, whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall connive or conspire, or take any other action, designed to prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years: * * *

## STATEMENT

An indictment in four counts was returned against defendant in the United States District Court for the Southern District of California, alleging that he was an alien who had entered the United States from Russia in 1913; that an order of deportation had been entered against him in 1930 on the ground that he advocated the overthrow of the Government by force and violence; and that within six months after September 23, 1950, he had (1) willfully failed to depart; (2) willfully failed to make timely application in good faith for travel documents necessary to his depar-

ture; (3) willfully refused to depart; (4) willfully refused to make timely application in good faith for travel documents necessary to his departure.

The defendant moved to dismiss the indictment on the ground, *inter alia*, that the statute was unconstitutionally vague and indefinite. The District Court overruled the motion as to counts 1 and 3 charging failure and refusal to depart, but sustained the motion as to counts 2 and 4, charging failure and refusal in good faith to make timely application for travel documents necessary to his departure. The court held that the portion of the statute under which these counts were laid was vague and indefinite in two respects: (1) it did not specify the nature of the travel documents necessary for departure; (2) it did not specify to which country or how many countries the alien should make application.

## THE QUESTION IS SUBSTANTIAL

At the time of the enactment of the Internal Security Act of 1950, more than 3,000 outstanding orders of deportation were found to be unenforceable because the country of origin would not receive the alien (Hearings before Subcommittee 1, House Judiciary Committee on H.R. 10, pp. 4-5).[1] By enacting the statute here involved, Congress intended to require certain groups of such aliens, including those ordered deported for advocating the overthrow of the Government by force and violence to make some efforts in their own behalf to

[1] Section 23 is an outgrowth of the so-called Hobbs Bill, H. R. 10, 81st Cong. (see S. Rep. 2369, 81st Cong.).

leave the United States.[2] The decision below substantially nullifies that congressional directive since the first step which an alien must take to effectuate his departure is to obtain travel documents from the country to which he wishes to go. The inability to penalize an alien who refuses to make such application will seriously hamper the enforcement of the statute.

The District Court's ruling that the statute is unconstitutionally indefinite, in that travel documents are not defined by the statute and might be construed to include a ticket to Mexico, is clearly without merit. "Travel documents" in relation to journeys to foreign countries would normally be understood to mean such papers as passports and visas—those documents required in order lawfully to enter another nation; obviously Congress could not and did not intend to require an alien to violate the laws of another country by entering that country illegally. Indeed, in another portion of Section 23(c) of the Internal Security Act, which provides that a court may suspend the sentence of an alien, it is specified that one of the factors to be considered is the reason for the inability of the United States "to secure passports, other travel documents, or deportation facilities." It is thus clear that the statute uses travel documents in the sense of passports, visas, and the like. The Su-

[2] In hearings on the Hobbs Bill, the Commissioner of Immigration pointed out that experience had shown that aliens often could arrange to leave this country even after their governments had refused to issue travel documents at the request of the United States (Hearings before Subcommittee 1, House Judiciary Committee on H. R. 10, p. 9).

preme Court has frequently held that requirements of compliance that are perhaps vague in their literal terms are to be tested by reference to the common usage and understanding to which the requirements relate. *Omacchevarria* v. *Idaho*, 246 U.S. 343, 348; *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 501-503; *Sproles* v. *Binford*, 286 U.S. 374, 392-393.

As to the second ground of the court's decision, that the statute does not specify the country to which the alien should apply or the number of applications he should make, such fact does not show that the statute is too vague and indefinite to inform the alien of the duty which the law imposes upon him. The statute punishes one who willfully fails to make application in good faith. It is certainly clear that one who makes no application at all to any country has failed to meet the requirements of the statute. Moreover, it is clearly possible for an alien to select a country to which he would like to go; in fact Section 20(a) specifically provides that the alien must be given that choice. If the alien does make a selection and applies for travel documents to the country of his selection, the question then becomes whether such evidence is sufficient to show good faith, or whether some further action must also be taken by the alien. The fact that a jury must decide a question of degree as to whether particular conduct meets the requirement of the statute does not render the statute vague. *Nash* v. *United States*, 229 U.S. 373, 376-378; *United States* v. *Ragen*, 314 U.S. 513, 522-524. The statute here involved is no more vague in this respect than those involved in other

situations in which the Supreme Court has upheld a statute challenged for vagueness. See *Omaechevarria* v. *Idaho*, 246 U.S. 243, 348 (grazing sheep "upon any range usually occupied by any cattle grower either as a spring, summer or winter range for his cattle"); *United States* v. *Alford*, 274 U.S. 264, 267 (building a fire "near" forest or inflammable material upon the public domain); *Bandini Co.* v. *Superior Court*, 284 U.S. 8, 17-18 (an "unreasonable waste" of gas where it "has been allowed to come to the surface without its lifting power having been utilized to produce the greatest quantity of oil in proportion"); *Sproles* v. *Binford*, 286 U.S. 374, 392-393 ("nearest practicable common carrier receiving or loading point", by "shortest practicable route," and "point equipped to transport such load"); *United States* v. *Ragen*, 314 U.S. 513, 522-524 ("reasonable" allowance for salaries in determining question of willful evasion of tax); *Screws* v. *United States*, 325 U.S. 91, 101-103 ("willfully" depriving any person "under color of any law" of "any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States"); and *United States* v. *Petrillo*, 332 U.S. 1, 6-8 (forcing employment of persons at a broadcasting station "in excess of the number * * * needed by such licensee to perform actual services"). Since the statute requires that the alien must act willfully in refusing to make application in good faith, no alien making an honest attempt to secure travel documents will be subject to penalties. As the Supreme Court said in *United States* v. *Ragen*, 314 U.S. at p. 523, "A mind intent upon willful evasion is inconsistent with surprised innocence."

It is therefore respectfully submitted that the decision of the District Court is erroneous and that the question presented by this appeal is a substantial one which should be settled by the Supreme Court.

Respectfully submitted,

PHILIP B. PERLMAN,
*Solicitor General.*

ERNEST A. TOLIN,
*United States Attorney.*

RAY H. KINNISON,
*Assistant U. S. Attorney,*
*Chief of Criminal Division.*

OCTOBER 1951.

## APPENDIX

No. 21,844—Criminal

**Memorandum of Decision**

U. S. District Court

For the Southern District of California
Central Division

United States of America, *Plaintiff*,

v.

Frank Efroim Spector, *Defendant*.

Defendant stands indicted for alleged violations of those provisions of § 23 of the Internal Security Act of 1950 [64 Stat. ——, 8 U.S.C. § 156(c)] which declare that:

> "Any alien against whom an order of deportation is outstanding . . . who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or from September 23, 1950, whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure . . . shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years . . ."

The indictment contains four counts averring that defendant is an alien against whom an order of deportation entered Aug. 13, 1930 is outstanding, and that "during the period of six months from Sept. 23, 1950," defendant did willfully "fail

to depart from the United States" [Count 1]; "fail to make timely application in good faith for travel or other documents necessary to his departure from the United States" [Count 2]; "refuse to depart from the United States" [Count 3]; and "refuse to make timely application in good faith for travel or other documents necessary to his departure from the United States" [Count 4].

Defendant moves to dismiss the indictment. In support of the motion he urges the above-quoted provisions of § 23 of the Act must be held unconstitutional [see *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886); *Wong Wing* v. *United States*, 163 U.S. 228, 238 (1896)] upon the grounds inter alia that the statute denies defendant due process of law [U. S. Const. Amend. V.], is an ex post facto law [U. S. Const. Art. I, § 9], and imposes cruel and unusual punishment [U. S. Const. Amend. VIII].

In "The Chinese Exclusion Case" [*Chae Chan Ping* v. *United States*, 130 U.S. 581, 606-607, 609 (1889)], the Supreme Court said:

> "The power of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied . . . the power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States . . ."

Later in *Fong Yue Ting* v. *United States*, 149 U.S. 698, 707 (1893), the Court declared that:

> "The right of a nation to expel or deport foreigners . . . rests upon the same grounds

and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."

The statute at bar was enacted in exercise of this inherent right of sovereignty. The Congress in effect has ordered all aliens against whom an order of deportation is outstanding to depart from this country within a specified period, and provided for the punishment of any who willfully fail or refuse "to depart" or "to make timely application . . . for travel or other documents necessary to . . . departure." [8 U.S.C. § 156(c).]

Defendant asserts that this congressional enactment "is so vague and indefinite that it fails to give due notice of what it punishes", and hence falls within the constitutional prohibition of the Fifth Amendment that "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

The due process clause of the Fifth Amendment requires that "criminal statutes . . . give due notice that an act has been made criminal before it is done . . ." [*Jordan* v. *DeGeorge*, 341 U.S. 223, 230 (1951)] because "Every man should be able to know with certainty when he is committing a crime" [*United States* v. *Reese*, 92 U.S. 214, 220 (1875)]. Hence "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." [*Connally* v. *General Construction Co.*, 269, U.S. 385, 391 (1926).]

If challenged as repugnant to the due process clause of the Fifth Amendment, a statute must be tested "on its face"; for it is "the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." [*Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939); *United States* v. *Petrillo*, 332 U.S. 1, 6-7 (1947); cf *Dennis* v. *United States*, 341 U.S. 494, 515 (1951) (opinion of Vinson, C.J.).]

First challenged by defendant are those provisions of § 23 of the Internal Security Act of 1950 [64 Stat. —, 8 U.S.C. § 156(c)] which declare guilty of a felony "any alien against whom an order of deportation is outstanding . . . who shall willfully fail or refuse to depart from the United States within a period of six months from . . . September 23, 1950."

I find in this language no uncertainty "which deprives a person of the ability to predetermine whether a contemplated action (omission) is criminal under the provisions of this law." [*Gorin* v. *United States*, 312 U.S. 19, 27 (1941); *id.* at 27, n. 13]. The act commanded to be done, the identity of the group subject to the command, and the time limit for performance, all are clear and specific. That part of the statute which serves as the basis for the first and third counts of the indictment must therefore be held to meet fully the constitutional requirement of certainty within the "due process" clause of the Fifth Amendment.

Next to be considered are the provisions of § 23 declaring guilty of a felony "any alien against whom an order of deportation is outstanding . . . who shall willfully fail or refuse . . . to make timely application in good faith for travel or other docu-

ments necessary to his departure . . ." This portion of the statute is involved in the second and fourth counts of the indictment.

Assuming that "timely application" means an application made early enough to enable the alien "to depart from the United States within a period of six months from the date of . . . order of deportation, or from Sept. 23, 1950, whichever is later" [see 8 U.S.C. § 156(c)], the questions remain (1) for what and (2) to whom shall the application be made.

The statute merely provides that timely application be made "for travel or other documents necessary to his departure." Would "timely" purchase of a Sunday bus ticket to Tijuana across the Mexican border suffice? Or would it be necessary to obtain more formal "travel or other documents necessary to . . . departure" in order to avoid criminality?

If it be assumed the "travel or other documents" referred to must mean passports, visas, permits or the like, there still remains the question whether the statute commands the alien to make "timely application" therefor to only one foreign country, or to all foreign countries maintaining consulates in the city, county and state of the alien's residence, or to all embassies and consulates in the nation's capitol. [See *United States* v. *Evans*, 333 U.S. 483, 486-488, 495 (1948).]

Elaboration seems surplusage. This part of § 23 commands the alien "to determine his conduct not . . . by reference to knowable criteria, but by . . . conjecture . . ." [*Collins* v. *Kentucky*, 234 U.S. 634, 638 (1914).]

Where a criminal statute forbids affirmative ac-

tion, one in doubt as to precisely what is forbidden can escape a charge of criminality by avoiding all conduct closely resembling the uncertain acts so forbidden. [See *United States* v. *Petrillo, supra,* 332 U.S. at 5-8; *United States* v. *Alford,* 274 U.S. 264, 267 (1927); *Omaechevarria* v. *Idaho,* 246 U.S. 343, 348 (1918).] But even that method of compliance is not available where the statute makes criminal an omission or failure to act. For a statute prohibiting an omission is in effect a law commanding action; and no one can foretell compliance unless the command be reasonably specific.

So if specificity be essential to due process, and hence to the constitutionality of criminal statutes forbidding affirmative action [see *United States* v. *Cohen Grocery Co.,* 255 U.S. 81, 89 (1921); *Stromberg* v. *California,* 283 U.S. 359, 369 (1931); *Herndon* v. *Lowry,* 301 U.S. 242, 261-264 (1937)], statutes making criminal an omission should a multo fortiori specifically declare what action is required for compliance, to the end that all may know precisely what affirmative conduct is required to avoid commission of a crime. [See *Screws* v. *United States,* 325 U.S. 91 (1945).]

The government however points to the fact that § 23 specifies one must "willfully" fail or refuse to perform the acts commanded in order to commit the offense, and urges that despite any indefiniteness in language the provisions in question give due notice of conduct made criminal because "punishment is imposed only for a neglect of duty knowingly omitted with the purpose of omitting that which the statute requires." But again, although the element of willfulness may compensate for some lack of specificity in a criminal statute

forbidding affirmative acts [see *Williams* v. *United States*, 341 U.S. 97, 101 (1951); *Communications Ass'n* v. *Douds*, 339 U.S. 382, 413 (1950); *Screws* v. *United States, supra*, 325 U.S. at 101; *United States* v. *Ragen*, 314 U.S. 513, 524 (1942); *Omaechevarria* v. *Idaho, supra*, 246 U.S. at 348], it can serve no such purpose where as here the statute condemns inaction and constitutes in effect a command to do some vague and indefinite act or series of acts.

Since all are entitled to be informed—indeed are presumed to know—what the law forbids and what the law commands [*Hamburg-American Line* v. *United States*, 291 U.S. 420, 426 (1934)], the law should not "lag behind common sense." [*Ludecke* v. *Watkins*, 335 U.S. 160, 166-167 (1948).] And common sense as well as our concept of due process of law dictate that standards of proscribed conduct be even more definite where the conduct forbidden is an omission. [See *Viereck* v. *United States*, 318 U.S. 236, 241-243, 245 (1943).]

The provisions of § 23 of the Internal Security Act of 1950 [64 Stat. —, 8 U.S.C. § 156(c)] upon which the second and fourth counts of the indictment are based must therefore be held to be too vague and uncertain to meet the essential requirements of due process of law within the Fifth Amendment.

Defendant's remaining contention of unconstitutionality cannot be sustained. In view of the nation's inherent right to expel and deport aliens [*Fong Yue-Ting* v. *United States, supra*, 149 U.S. at 707], punishing those against whom an order of deportation is outstanding who "willfully fail or refuse to depart" [8 U.S.C. § 156(c)] is clearly

not a violation of due process. Nor is maximum punishment of ten years imprisonment for such an offense "cruel and unusual" within the meaning of the constitutional limitation. [U. S. Const. Amend. VIII; *Becker* v. *United States*, 91 F. 2d 550 (9th Cir. 1937); *United States* v. *Sorcey*, 151 F. 2d 899, 902-903 (7th Cir. 1945), *cert. denied* 327 U. S. 794 (1946); cf. *Weems* v. *United States*, 217 U.S. 349 (1910).] And since the conduct proscribed by the provision "willfully fail or refuse to depart" is only such as occurs more than six months after the date of enactment of the statute [see 8 U.S.C. § 156(c)], it is not an "ex post facto Law." [U. S. Const. Art. I, § 9; *Garner* v. *Los Angeles Board*, 341 U.S. 716, 721 (1951).]

Defendant urges dismissal upon the further ground that the third and fourth counts of the indictment charge the same offenses as the first and second counts. It is permissible to charge a single offense in different ways and separate counts, but upon conviction punishment may be imposed only for a single offense. [See *Barnes* v. *United States*, 142 F. 2d 648, 650 (9th Cir. 1944); *United States* v. *Bent*, 175 F. 2d 397, 400 (8th Cir. 1949); Fed. R. Cr. P. 8(a); 2 Wharton's Criminal Evidence § 1033 (11th ed. 1935); cf. *Catrino* v. *United States*, 176 F. 2d 884, 888 (9th Cir. 1949).]

For the reasons stated defendant's motion to dismiss should be and is hereby granted as to the second and fourth counts of the indictment and denied as to the first and third counts.

WM. C. MATHES,
*United States District Judge.*

SEPTEMBER 12, 1951.

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No. 443

# In the Supreme Court of the United States

OCTOBER TERM, 1951

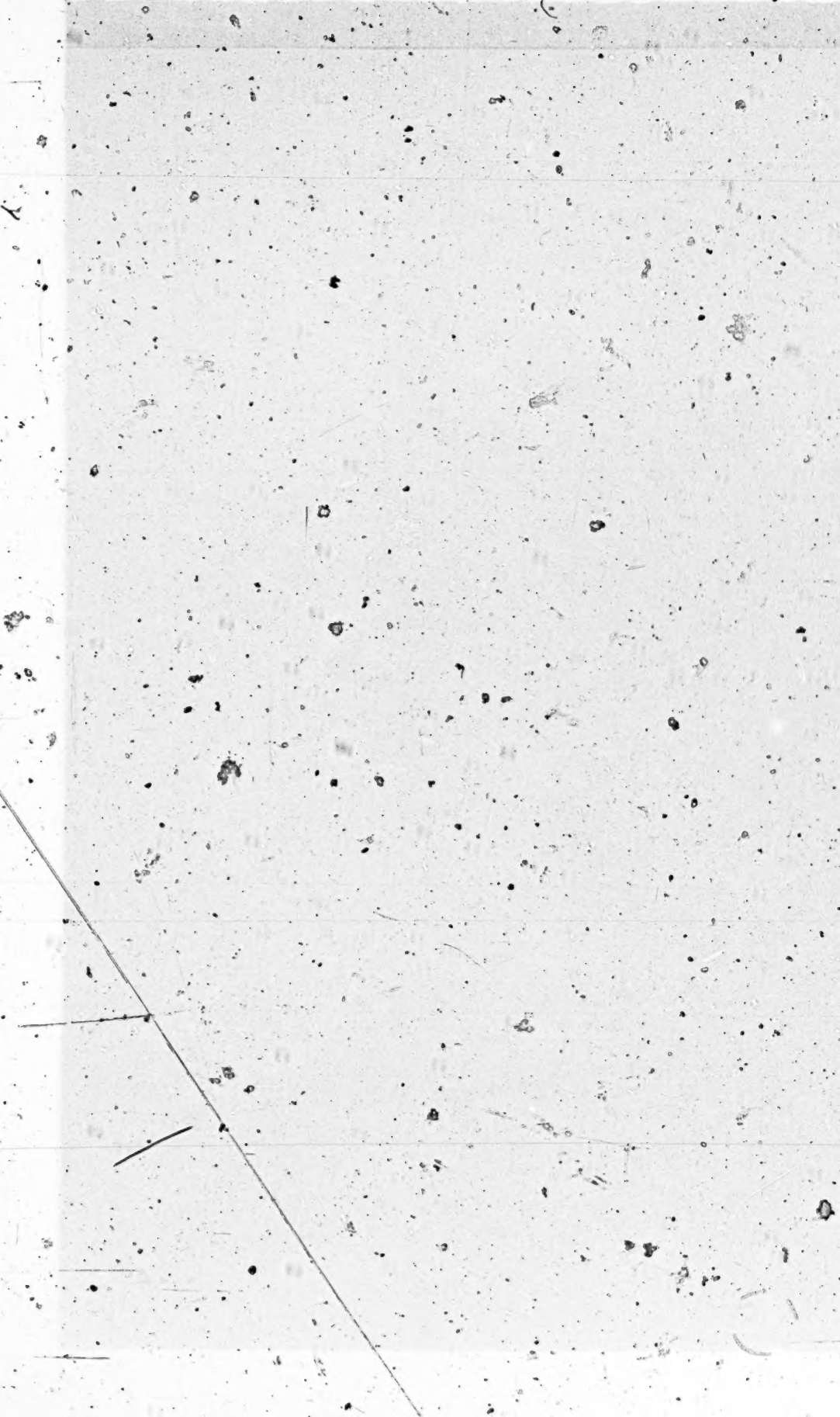
UNITED STATES OF AMERICA, PETITIONER,

v.

EFROIM SPECTOR

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

## BRIEF FOR THE UNITED STATES



# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement | 2 |
| Specification of errors to be relied upon | 4 |
| Summary of argument | 4 |
| Argument: | |
| The questioned portion of Section 23(e) of the Internal Security Act of 1950 clearly establishes an ascertainable standard of guilt | 6 |
| Introductory—the statute and its background | 6 |
| 1. The governing principles | 13 |
| 2. "Travel or other documents necessary for his departure" is not an indefinite phrase | 14 |
| 3. There is no invalidity with respect to the country to which application should be made | 18 |
| 4. The fact that affirmative action is required does not change the governing principles or their application to this case | 21 |
| 5. The statute is as definite as others held valid by this Court | 23 |
| Conclusion | 24 |
| Appendix A: | |
| Section 23 of the Internal Security Act of 1950, 64 Stat. 1010 | 25 |
| Appendix B: | |
| Forms I-229 and I-228 of the Immigration and Naturalization Service | 32 |


## CITATIONS

*Cases:*


| | |
|---|---|
| *American Communications Ass'n* v. *Douds*, 339 U.S. 382 | 13, 14, 16, 17, 22 |
| *Boyce Motor Lines* v. *United States*, decided Jan. 28, 1952 | 5, 6, 13, 14, 23 |
| *Connally* v. *General Construction Co.*, 269 U.S. 385 | 13, 14, 17 |
| *Dennis* v. *United States*, 341 U.S. 494 | 13, 14 |
| *Gorin* v. *United States*, 312 U.S. 19 | 14 |
| *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497 | 17, 22 |
| *Jordan* v. *DeGeorge*, 341 U.S. 223 | 6, 13, 23 |
| *Nash* v. *United States*, 229 U.S. 373 | 13, 24 |
| *Old Dearborn Co.* v. *Seagram Corp.*, 299 U.S. 183 | 24 |

Cases—Continued


| | Page |
|---|---|
| *Onaechevarria* v. *Idaho*, 246 U.S. 343 | 14, 22, 24 |
| *Robinson* v. *United States*, 324 U.S. 282 | 13 |
| *Screws* v. *United States*, 325 U.S. 91 | 5, 14, 24 |
| *Stassi* v. *United States*, 152 F. 2d 581, certiorari denied, 328 U.S. 842 | 23 |
| *United States* v. *Alford*, 274 U.S. 264 | 24 |
| *United States* v. *Lembo*, 76 F. Supp. 209, reversed on other grounds *sub nom. United States* v. *Aleli*, 170 F. 2d 18 | 23 |
| *United States* v. *Ragen*, 314 U.S. 513 | 5, 6, 14, 17, 22, 24 |
| *United States* v. *Wain*, 162 F. 2d 60, certiorari denied, 332 U.S. 764 | 23 |
| *United States* v. *Weiss*, 65 F. Supp. 556, affirmed, 162 F. 2d 447, certiorari denied, 332 U.S. 767 | 23 |
| *United States* v. *Wurzbach*, 280 U.S. 396 | 13 |
| *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U.S. 86 | 24 |
| *Williams* v. *United States*, 341 U.S. 97 | 24 |
| *Winters* v. *New York*, 333 U.S. 507 | 13, 14, 16 |


*Statutes:*


| | |
|---|---|
| Act of June 20, 1941, 55 Stat. 252 | 15 |
| Immigration Act of 1917: | |
| Sec. 20, as amended by Sec. 23 of the Internal Security Act of 1950, 64 Stat. 1010, 8 U.S.C. Supp. IV, 156: | |
| 20(a) | 5, 8, 19, 25 |
| (b) | 8, 29 |
| (c) | 2, 5, 6, 8, 12, 16, 17, 18, 20, 23, 30 |
| (d) | 31 |
| (e) | 32 |
| Internal Security Act of 1950, Sec. 23, 64 Stat. 1010, 8 U.S.C. Supp. IV, 156 | 2, 25 |


*Miscellaneous:*


| | |
|---|---|
| 8 C. F. R. 176.101 | 15 |
| 96 Cong. Rec.: | |
| 10449 | 11 |
| 10453 | 12 |
| 10675 | 9 |
| 14180 | 7 |
| 3 Hackworth, *Digest of International Law*, 456-465, 738-739 | 15 |
| Hearings before Subcommittee 1, House Judiciary Committee on H. R. 10, 81st Cong., 1st Sess., pp. 4-5 | 7 |

Miscellaneous—Continued


| | Page |
|---|---|
| Hearings on S. 1832 before Subcommittee on Immigration and Naturalization of the Senate Judiciary Committee, 81st Cong., 1st Sess., p. 326 | 9 |
| Hobbs Bill, H. R. 10, 81st Cong. | 6, 11, 12 |
| H. Rep. 1192, 81st Cong., 1st sess.: | |
| pp. 7-10 | 7, 10 |
| p. 8 | 7, 9 |
| Operations Instructions, Section 150.6 V and VI, April 12, 1951 | 18 |
| S. 4037, 81st Cong., 2d Sess. | 12 |
| Selective Service Regulations 626.1(b) | 23 |
| S. Rep. 2239, 81st Cong., 2d sess.: | |
| pp. 4, 6-8 | 7, 10 |
| p. 7 | 9 |
| p. 8 | 12 |

# In the Supreme Court of the United States

OCTOBER TERM, 1951

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No. 443

UNITED STATES OF AMERICA, PETITIONER

*v.*

EFROIM SPECTOR

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA*

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## BRIEF FOR THE UNITED STATES

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### OPINION BELOW

The opinion of the District Court dismissing the indictment (R. 8-13) is reported at 99 F. Supp. 778.

### JURISDICTION

The order of the District Court dismissing the indictment was entered October 15, 1951, *nunc pro tunc* as of September 12, 1951 (R. 13). The United States filed its notice of appeal to this Court on October 12, 1951, and a supplemental notice of appeal on October 19, 1951 (R. 15). Probable

jurisdiction was noted by this Court on January 2, 1952 (R. 16). The jurisdiction of this Court to review on direct appeal the order of the District Court dismissing the indictment based on the constitutionality of the statute on which the indictment is founded is conferred by the Criminal Appeals Act, 18 U.S.C., Supp. IV, 3731. See also Rule 37(a)(2) F.R. Crim. P.

## QUESTION PRESENTED

Section 20(c) of the Immigration Act of February 5, 1917, as amended by Section 23 of the Internal Security Act of 1950, 64 Stat. 1010, 8 U.S.C., Supp. IV, 156(c), makes it a criminal offense for an alien, ordered deported for advocating the overthrow of the Government by force or violence or for certain other reasons to "willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure." The question presented is whether this provision is so vague and indefinite as to violate the Fifth and Sixth Amendments.

## STATUTE INVOLVED

Section 23 of the Internal Security Act of 1950, 64 Stat. 1010, 8 U.S.C., Supp. IV, 156, which amends Section 20 of the Immigration Act of February 5, 1917, is set forth in Appendix A, *infra*, pp. 25-32.

## STATEMENT

An indictment in four counts was returned against appellee in the United States District

Court for the Southern District of California, alleging that he was an alien who had entered the United States from Russia in 1913; that an order of deportation had been entered against him on August 13, 1930, by reason of the fact that he advocated the overthrow of the Government by force and violence; and that, within six months after September 23, 1950, he did "wilfully fail to depart from the United States" (count one); "wilfully refuse to depart from the United States" (count three); "wilfully fail to make timely application in good faith for travel or other documents necessary to his departure from the United States" (count two); "wilfully refuse to make timely application in good faith for travel or other documents necessary to his departure from the United States" (count four) (R. 1-2).

Appellee moved to dismiss the indictment (R. 3-6). The District Court overruled the motion as to counts one and three, but sustained it as to counts two and four. The court held (R. 8-13) that the portion of the statute under which those counts was laid was unconstitutionally vague and indefinite in two respects:

(1) it did not specify the nature of the travel documents necessary for departure;

(2) it did not specify to which country or to how many countries the alien should make application.

## SPECIFICATION OF ERRORS TO BE RELIED UPON

1. The District Court erred in dismissing the second and fourth counts of the indictment.

2. The District Court erred in holding unconstitutionally vague and indefinite that portion of Section 23(c) of the Internal Security Act which makes it a felony for certain aliens against whom orders of deportation have been issued to "willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure."

## SUMMARY OF ARGUMENT

The phrase "travel or other documents necessary to his departure" is not too vague for the ordinary person to understand. Both the normal meaning of the phrase and its context in a statute dealing with deportation make it plain that the phrase means passports, visas, or other documents necessary for entrance into a foreign nation. The succeeding sentence of the statute, which refers to "passports, other travel documents, or deportation facilities," makes this clear beyond question. The provision involved is directed only at aliens, all of whom have entered the United States from a foreign country, and who are, therefore, in a peculiarly favorable position to know what "travel documents" in this context means. In addition, the possibility of punishment of the innocent is removed by the unusual double-barreled restriction of the prohibition to persons who "*willfully* fail or refuse to make timely application *in good faith*"

for the necessary documents. Cf. *United States* v. *Ragen*, 314 U.S. 513, 524; *Boyce Motor Lines* v. *United States*, decided January 28, 1952; *Screws* v. *United States* 325 U.S. 91. This is particularly true with respect to the offense of refusing to apply for the necessary documents, since "refuse" in itself connotes deliberate, intentional conduct.

Nor is the statute invalid for indefiniteness with respect to the country to which application should be made. Section 20(c) must be read with Section 20(a), which provides that the alien may name the country to which he shall be deported, and that if he does not do so the Attorney General shall make the selection from among the nations specified in the statute. In either case, there can be no uncertainty in the alien's mind as to the country to which he must apply, for it is either a country of his own choice or one selected by the Attorney General. On this aspect of the case, the requirement of willfulness and bad faith also makes it plain that no one can be convicted for what he would not have known was unlawful.

The fact that a statute does not contain a prohibition but an affirmative command does not change the applicable principles. Whether the congressional mandate is affirmative or negative, the question is whether a normal person will understand what the statute prohibits or commands, whether he can be punished for conduct which may be innocent because of vagueness of the law. The

distinction between an affirmative and a negative command cannot be reconciled with *United States* v. *Ragen, supra,* in which the statute affirmatively required the filing of income tax returns with only "reasonable" deductions for salaries.

Unquestionably, this statute is no more vague and indefinite than others which have been upheld by this Court. E. g., *Boyce Motor Lines* v. *United States, supra; Jordan v. De George,* 331 U.S. 223.

## ARGUMENT

### The Questioned Portion of Section 23(c) of the Internal Security Act of 1950 Clearly Establishes an Ascertainable Standard of Guilt.

*Introductory—the statute and its background.*

The pertinent portion of Section 20(c) of the Immigration Act of 1917 (as rewritten in Section 23 of the Internal Security Act of 1950, 64 Stat. 1010, 8 U.S.C., Supp. IV, 156(c)) reads as follows:

> Any alien against whom an order of deportation is outstanding under [various named statutes] * * * who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or from the date of the enactment of the Subversive Activities Control Act of 1950, whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, * * * shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years: * * *

Section 20 (c) was originally introduced as a part of the Hobbs Bill, H.R. 10, 81st Cong., subse-

quently incorporated, with some changes, in the Internal Security Act. Its object was to deal with the problem presented by the fact that many aliens who had been ordered deported remained in this country indefinitely because the countries of their nationality refused to receive them. H. Rep. 1192, 81st Cong., 1st Sess., pp. 7-10; S. Rep. 2239, 81st Cong., 2d Sess., pp. 4, 6-8. Under then existing legislation, nothing could be done to enforce such orders. A foreign country could keep an agent in the United States indefinitely by the simple method of refusing to issue travel documents when the agent was ordered deported.

In hearings on the originated bill, Congress learned that, as of April 15, 1949, there were 3,278 unenforceable warrants of deportation outstanding, including 2,147 for iron curtain nationals (See Reports, *supra*, and Hearings before Subcommittee 1, House Judiciary Committee on H.R. 10, 81st Cong., 1st Sess., pp. 4-5). The Attorney General presented forty case histories, including that of appellee, as illustrations of this unfortunate situation.[1] The committee report noted as to appellee in

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[1] The report of the House committee contains the following language (H. Rep. 1192, 81st Cong., 1st Sess., p. 8), which was repeated by Senator McCarran on the floor of the Senate (96 Cong. Rec. 14180):

> First is the case of Frank E. Spector, born in Odessa, Russia, and now living in Los Angeles, Calif. He served a jail sentence in California in 1930 and was ordered deported by the Attorney General that same year, being a person who advocates and teaches the overthrow by force or violence of the Government of the United States. Spector showed up in Los Angeles about 1921. Since then

particular that "He has been openly and usually defiant of this Government's efforts to carry out the law in his case."[2] The new Section 20 was designed to correct the evil presented by such cases as that of appellee. It did this in several ways. By Section 20 (a) it allowed an alien to be deported to the country of his preference, and enlarged the authority of the Attorney General to determine the country to which an alien unlawfully in the United States might be deported if he made no choice.[3] It provided for supervision of aliens against whom orders of deportation have been outstanding more than six months. (Sec. 20 (b).) And by Sec. 20 (c), part of which is here involved, it imposed on aliens ordered deported as criminals, immoral per-

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he has had a record of continuous activities and leadership in the Communist party. Last year he defied the authority of the California State Senate and was threatened with contempt. He was told that contempt might be ground for deportation from the United States. In reply Spector retorted, "You are too late, Mr. Tenney, my order of deportation has been issued 21 years ago and I am still here." The Attorney General's comment on Spector is as follows:

"As a result of numerous refusals on the part of Russia to issue a travel document to the alien, he is free to travel in the United States, and continue his communistic activities. He has been openly and usually defiant of this Government's efforts to carry out the law in his case. We have no means whereby he can be taken into custody. In view of his ability as a leader and organizer, he is a distinct threat to the national security of the United States."

[2] See note 1, *supra*.

[3] Under Section 20(a) an alien is to be deported, first to the country of the alien's preference if it will accept him; then to various countries to which he has ties, such as the country from which he entered, a country in which he resided, or the country of birth or nationality; and finally, if none of the above is practicable or advisable, to any country willing to accept him. See p. 25, *infra*.

sons or subversives the affirmative duty both to cooperate with the Attorney General and to take steps on their own behalf to effectuate their departure. See p. 30, *infra*.

The Committee reports and debates on the Hobbs Bill disclosed that the inability to deport such aliens stemmed in part from the alien's own unwillingness to take the steps necessary for departure. Experience had demonstrated that foreign countries would sometimes accept an alien making his own application for departure but not a governmental request to allow the deportation.[4]

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[4] H. Rep. 1192, 81st Cong., 1st Sess., p. 8; S. Rep. 2239, 81st Cong., 2d Sess., p. 7:

> The second case is that of Badrig Selian, 50, a native of Turkey. He is an active member of the Communist Party and one of their most important publicists in the United States. In 1930 his deportation was ordered but refused by Turkey and by Syria, which now controls his birthplace. Of his own free will he left the United States last year after the Government had failed throughout 18 years to get him out of the country. Concerning the Selian case the Attorney General says that—
>
> "this Communist declined to leave the United States, and since no country of origin would take him we were obliged to permit him to remain here at large. When it suited his own purposes, however, he was able through his own efforts to obtain a passport."

96 Cong. Rec. 10675, Representative Hobbs:

> * * * although in one case 13 applications of your Government were turned down flat, cold, and then a few months later when the man himself applied he got it in 5 days.

Hearings on S. 1832 before Subcommittee on Immigration and Naturalization of the Senate Judiciary Committee, 81st Cong., 1st Sess., p. 326:

> Attorney General Clark. * * *
>
> Since April 1, 1948, nine other persons known to be subversives who were under warrants of deportation have departed from the United States at their own expense.

In addition, there is difficulty in deporting aliens who will not obtain the necessary travel documents, inasmuch as foreign nations generally require such documents even for aliens deported by the Government.

These difficulties were noted in the Committee Reports on H. R. 10 (H. Rep. 1192, 81st Cong., 1st Sess., pp. 7, 9, 10; S. Rep. 2239, 81st Cong., 2d Sess., pp. 6, 8):

> But over a period of years there have arisen hundreds of cases of aliens who have been ordered deported by the duly constituted authorities of this Nation who could not be deported because of the failure or refusal of foreign governments to grant passports for their return and, in some instances, *by refusal of the aliens themselves to cooperate or take steps to obtain travel documents* or to leave the United States even though they had been ordered deported.
>
> * * * * * *
>
> The gravity of the situation stems from the absence of any power now placed in the Attorney General to exercise continuing supervision and control over aliens who have been ordered deported but who, either because of *lack of cooperation* by foreign governments *or by the aliens themselves,* cannot be deported from the United States * * *.
>
> * * * * *
>
> The committee has no doubt and experience has shown that many such individuals,

> who under existing law make no move to leave the United States once they realize that their deportation cannot be accomplished by our Government, will find it possible and preferable to arrange to leave the United States rather than to remain and subject themselves to continued supervision by Government officials or the possibility, in some cases, of undergoing indefinite periods of detention. *Experience indicates that aliens themselves often arrange to leave this country even after their governments have refused to issue travel documents for their deportation at the request of this Government.* [Italics supplied]

Representative Walter, a Member of the House Committee, subsequently stated during the debate (96 Cong. Rec. 10449):

> There are outstanding today nearly 3,000 orders for deportation of that type of person, and by the refusal of a foreign country to take them back *or by their refusal to attempt to obtain the necessary travel documents* they enjoy complete freedom of movement and action because they are released on bonds of $500. [Italics supplied]

As originally proposed, H. R. 10 would have stimulated activity on the part of the alien ordered deported by authorizing the Attorney General to detain the prescribed classes of aliens until departure could be arranged. However, the Senate, because of doubts as to the constitutionality of such indefinite detention, substituted the provisions for

criminal punishment of aliens who willfully failed to depart. S. Rep. 2239, 81st Cong., 2d Sess., p. 8.

The clause involved in this case, requiring timely application for travel documents, was inserted when the content of H. R. 10 was incorporated in the bill (S. 4037, 81st Cong., 2d Sess.) which became the Internal Security Act. The subsequent legislative history contains no comment upon, explanation of, or opposition to this particular provision. But the earlier description of the problem before Congress makes it quite clear that the purposes of the clause in question were both to prevent an alien ordered deported from frustrating the Government's efforts by *refusing* to apply for or sign the necessary travel documents, and to require the alien, who was required by the preceding clause to depart within six months, to take steps which would enable him to leave the United States by not *failing* to apply for such documents.[5] The bill, both in original and final form, was thus designed to give the aliens ordered deported, who would otherwise "make no effort to obtain the necessary papers," an "incentive to find a country which would be willing to have them" (96 Cong. Rec. 10453), with the reasonable expectation, supported by experience, that this would frequently result in their deportation from the United States.

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[5] This explains the use of both "fail" and "refuse" in Section 20(c).

1. *The Governing Principles.*

In a number of recent cases, this Court has been called upon to decide whether a statute was definite enough to satisfy the requirements of the due process clause. For present purposes, it is sufficient to state that the test is whether a statute is so vague that it does not convey a "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Jordan* v. *De George,* 341 U.S. 223, 231-232; *Connally* v. *General Construction Co.,* 269 U.S. 385, 391; *Dennis* v. *United States,* 341 U.S. 494, 515; *Winters* v. *New York,* 333 U.S. 507, 518; *Boyce Motor Lines* v. *United States,* decided January 28, 1952. In applying this test, this Court has declared: (1) that the presence of difficult "border line" or "peripheral" cases does not invalidate a statutory provision where there is a hard core of circumstances to which the statute unquestionably applies and as to which the ordinary person would have no doubt as to its application (*Jordan* v. *De George, Dennis* v. *United States,* both *supra; United States* v. *Wurzbach,* 280 U.S. 396, 399; *Robinson* v. *United States,* 324 U.S. 282, 286; *Nash* v. *United States,* 229 U.S. 373), (2) that it is proper to look at "the entire text of the statute" (*Winters* v. *New York,* 333 U.S. 507, 518), (3) that "the particular context is all important" (*American Communications Ass'n* v. *Douds,* 339 U.S. 382, 412), and (4) that the inquiry is whether

the statute is sufficiently explicit to inform those "who are subject to it" (*Connally* v. *General Construction Co., supra*), "those to whom the statute is directed" (*American Communications Ass'n* v. *Douds, supra*). And the Court has, without exception, held (5) that a requirement that conduct be willful, or in bad faith, relieves "the statute of the objection that it punishes without warning an offense of which the accused was unaware" (*Screws* v. *United States,* 325 U.S. 91, 102). "Since the constitutional vice in a vague or indefinite statute is the injustice to the accused in placing him on trial for an offense, the nature of which he is given no fair warning, the fact that punishment is restricted to acts done with knowledge that they contravene the statute makes this objection untenable." *American Communications Ass'n.* v. *Douds, supra,* at p. 413; *United States* v. *Ragen,* 314 U.S. 513, 524; *Gorin* v. *United States,* 312 U.S. 19, 27-28; *Omaechevarria* v. *Idaho,* 246 U.S. 343, 348; *Dennis* v. *United States,* 341 U.S. 494, 515; *Boyce Motor Lines* v. *United States,* decided January 28, 1952; *cf. Winters* v. *New York,* 333 U.S. 507, 519.

All of these criteria of definiteness combine to demonstrate that the statute here involved does not depart from constitutional requirements.

2. *"Travel or other documents necessary for his departure" is not an indefinite phrase.*

a. The phrase found too indefinite by the court below was "travel or other documents necessary to

his departure". We confess to not seeing any basis for the holding that this phrase is too vague for the ordinary person to understand. The statute is concerned with aliens departing for foreign countries. "Travel documents" in that context can have no other meaning except those official documents required in order lawfully to enter another nation.[6] An alien ordered deported would normally understand the phrase to mean passports, visas, or other documents necessary for entrance into a foreign nation. The suggestion by the court below that a "bus ticket to Tia Juana," Mexico, might be deemed sufficient, does not, we submit, comport with the common understanding of the meaning of "travel documents". Such a ticket would not normally be described as a "document", and it would not enable the holder lawfully to enter a foreign country.

b. Thus, if the phrase is merely read in the con-

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[6] "Travel documents" is a term commonly used in connection with entry from one country to another. Thus the term was used in a statute authorizing consular officials to refuse a "visa or other travel document." Act of June 20, 1941, 55 Stat. 252. The same statute earlier states that consular officials can deny "to such alien any immigration visa, passport visa, transit certificate, or other document entitling such alien to present himself for admission into the United States." Similarly, the term has been used in State Department orders and correspondence in the sense of official certificates necessary to enter one country from another. 3 Hackworth, *Digest of International Law*, 456-464, 738-739. The term "passport" is ordinarily restricted to a certificate issued by a country to its citizens who wish to travel in a foreign country. See 8 CFR 176.101. The term "travel document" is used either to refer to a similar certificate issued to an alien, or more broadly to include other types of certificates authorizing entry.

text of the immediate clause in which it is found, there can be no doubt that its meaning would be well understood. Any question as to this should be resolved by a complete reading of subsection (c). For, in the following sentence (*infra*, p. 31) the subsection provides that a sentence thereunder may be suspended if the Government of the United States is unable to secure "passports, other travel documents, or deportation facilities" from the country or countries to which the alien has been ordered deported. This demonstrates—if demonstration be needed—that "travel documents" connote passports or equivalent documents necessary for travel abroad. We have already referred to this Court's decisions holding that not only the "context" of the language in question (*Douds, supra*, at 412) but "the entire text of the statute" (*Winters, supra*, at 518) are to be considered in determining whether a statute is too vague. Obviously it is proper to take into account the next sentence in the same paragraph when it indicates clearly what is meant by the language in question.

c. It is also significant that Section 20(c) is directed only at aliens, all of whom entered the United States from a foreign country, and who are therefore in a peculiarly favorable position to know the meaning of travel and other documents necessary for departing from one country for another. The test, as this Court has stated, is whether the statute is definite enough for those "to

whom [it] is directed" (*Douds, supra*), those who "are subject to it" (*Connally, supra*).

d. Finally the possibility of punishment of the innocent is removed by the unusual double-barreled restriction of the prohibition to persons who "*willfully* fail or refuse to make timely application *in good faith*" for the necessary documents (italics supplied). Even more clearly than in *United States* v. *Ragen*, 314 U.S. 513, 524, can it be said that, "On no construction can the statutory provisions here involved become a trap for those who act in good faith. A mind intent upon willful evasion is inconsistent with surprised innocence." Unquestionably the persons subject to this statute "are not required to act at their peril but only to exercise their judgment in good faith, in order to avoid coming into conflict with the statutes" (*Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 501).

This is particularly true as to the requirement in Section 20 (c) that an alien not willfully "refuse" to apply for the necessary documents. See Count IV of the indictment. (R. 2). The word "refuse" in itself connotes deliberate intentional conduct. A person cannot willfully *refuse* to procure the documents without knowing what he is refusing to do. Refusal to do something implies that a person has been informed of what he is supposed to do and requested or ordered to do it. When refusal is charged, the evidence might well show that the immigration authorities have told

an alien precisely what the statute requires,[7] and that the alien has deliberately declined to follow either the statute or the supplementary advice.[8] In such circumstances, an alien's refusal to perform his statutory duty must necessarily stem, not from lack of understanding of his obligation, but from willful determination not to comply.

3. *There is no invalidity with respect to the country to which application should be made.*

The court below also held Section 20(c) invalid because it does not specify the country or countries to which the applicant must make "timely application" for travel documents. The determination of the country to which the alien is required to make

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[7] The Immigration and Naturalization Service has instructed its officers (Operations Instructions, Section 150.6 V and VI, April 12, 1951) to deliver to aliens ordered deported Forms I-228 and I-229, copies of which are annexed hereto as Appendix B (*infra*, pp. 32-35). Form I-229 directs the aliens' attention to the requirements of Section 20(c), and states that:

> Therefore, you will recognize the importance of making every effort in good faith to obtain *passport* or other travel documents so that you may effect your departure pursuant to the said order of deportation within the time prescribed by the quotation above from the Internal Security Act of 1950. [Italics supplied.]

Form I-228, which the alien is requested to fill out, calls for him to specify the country of his choice, and concludes:

> I understand that the Immigration and Naturalization Service will assist me in applying for permission for entry into the country specified by me, but if that country is not willing to permit my entry, I will be deported pursuant to law.

[8] The suggested set of facts would be provable under the present indictment.

application for travel documents takes on specificity when considered in relation to the section as a whole. Section 20(a) (*infra*, p. 25) provides that the alien is free to name the country to which he shall be deported, if it will accept him. If he does not do so (or if he names a country which will not accept him) the Attorney General makes the selection from among the nations specified in the statute. The Attorney General presumably will choose a country to which he thinks it possible to deport the alien.

Thus Congress contemplated that in every case either the alien himself or the Attorney General will have selected a country for deportation. If the alien makes the choice of country, he is not allowed to *fail* to follow through on his selection by not applying for the necessary documents. If the Attorney General determines the country, as he invariably did prior to the 1950 Act, he will normally advise the alien of his decision and ask him to obtain or fill out whatever documents are necessary; the statute makes unlawful the alien's *refusal* to do so. In either situation there can be no uncertainty in the alien's mind as to the country to which he must apply, for it is either a country of his own choice or a nation selected by the Attorney General.

Nor would there be any unconstitutional indefiniteness as to the number of countries to which application must be made. The alien would only have to apply to more than one country selected by the

Attorney General if the first would not admit him and the Attorney General then picked another. In that case, of course, the alternative country would be specifically named, so that there would be no problem of indefiniteness. If the Attorney General has not informed the alien of the country of deportation, then in the light of the prior clause of Section 20(c) which provides that an alien must not "willfully fail or refuse to depart" within six months the alien would seem to have an affirmative duty to choose some country and to apply thereto for travel documents. In this situation, it is clear that an alien who makes *no* application to *any* country has willfully violated the statute.

To what extent, in the rare case where the Attorney General has made no designation and the alien has unsuccessfully but in good faith applied for travel documents to one country, the alien must go further and apply to another would depend on the circumstances of the case[9] and whether he could be said to be acting in bad faith if he failed to do so. It should not be assumed that this case is in that rare class; if the case is tried it will appear that it is not. The fact that there may be uncertainty as to some marginal or unusual applications of the statute would not render the statute as a whole unconstitutionally indefinite. See cases cited at page 13, *supra*. As long as there is a substantial class of

[9] Such as, whether there is another country with which the alien has had such a connection as to make it reasonable to expect that the country might accept him.

cases to which the statute can be validly applied, it should not be held too indefinite on the basis of the bare indictment, without the opportunity of adducing proof at the trial which would show whether or not the case came within the exceptional class.

What has been said (*supra*, pp. 14, 17) about the effect of scienter as an element of the offense upon the claim that the statute is too indefinite, is, of course, equally significant on this aspect of the case. No one can be convicted for not applying to the proper country or countries unless his failure or refusal is willful, in bad faith, which means that no one can be convicted for innocent misconduct. And, as we have noted, where a "refusal" is charged there must be proof that the alien has been told what he must do, and refused to do so—in which case a claim that he did not know what was required of him would clearly be specious.

*4. The fact that affirmative action is required does not change the governing principles or their application to this case.* The court below was of the view that the principles to which we have referred were not satisfied here because this statute, by prohibiting an omission to act, requires affirmative conduct. In particular, the court thought that this factor made inapplicable the cases holding that statutes are not too indefinite where a violation must be "willful." See p. 14, *supra*. The court below conceded, however, that even when affirmative action is required, it is sufficient that "the command be reasonably specific" (R. 11).

For all of the reasons set forth above, we think that the provision here involved—even apart from the requirements of *scienter*—is specific enough to apprise the normal man of what he must do to avoid a violation. But, in any event, we do not think that the principles differ because affirmative action is required. There is no inherent reason why they should. Whether the Congressional mandate is affirmative or negative, the question is whether a normal person will understand what the statute prohibits or commands, whether he can be punished for conduct which may be innocent because of the vagueness of the law. The requirement of *scienter* is obviously as great a protection whether affirmative or negative action is required. The attempted distinction cannot be reconciled with *United States* v. *Raifen*, 314 U.S. 513, 524, where the statute required affirmative action, the filing of income tax returns with only "reasonable" deductions for salaries. Furthermore, the attempted distinction is unrealistic. It would have been no satisfactory answer for the sheep herdsman in *Omaecheverria* v. *Idaho*, 246 U.S. 343, 348, that he could have avoided grazing his sheep entirely and thus escape a charge of interfering with the "usual and customary" use of a range. Similarly, inaction would have been no answer to the meat dealer in *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 501, or the union leader in *American Communications Ass'n.* v. *Douds*, 339 U.S. 382, 413; both had a right

to go on making their living in their perfectly legal occupations.

Section 20(c) is surely as certain as Selective Service Regulation 626.1(b), which also imposed an affirmative duty on a selected class; it required draft registrants to report "any fact that might result in the registrant being placed in a different classification." This regulation was repeatedly held constitutional in criminal cases against attacks predicated on vagueness. *United States* v. *Wain*, 162 F. 2d 60, 65 (C.A. 2), certiorari denied, 332 U.S. 764; *Stassi* v. *United States*, 152 F. 2d 581 (C.A. 5), certiorari denied, 328 U.S. 842; *United States* v. *Lembo*, 76 F. Supp. 209, 212 (E.D. Pa.), reversed on other grounds *sub nom. United States* v. *Aleli*, 170 F. 2d 18 (C.A. 3); *United States* v. *Weiss*, 65 F. Supp. 556, 558-562 (E.D. N.Y.), affirmed, 162 F. 2d 447 (C.A. 2), certiorari denied, 332 U.S. 767.

5. *The statute is as definite as others held valid by this Court.*

Finally, we think there can be no question that the statutory provision here involved is less vague and indefinite than others which have been upheld by this Court. "Travel or other documents necessary to his departure" and the country to which application must be made are certainly more definite concepts than "so far as practicable" (*Boyce Motor Lines* v. *United States, supra*); "crime involving moral turpitude" (*Jordan* v. *De George, supra*); whether competitive activities are "fair

and open" (*Old Dearborn Co.* v. *Seagram Corp.*, 299 U.S. 183); whether sheep are interfering with the "usual and customary" use of a range (*Omaechevarria* v. *Idaho*, 246 U.S. 343, 348); whether activities are "reasonably calculated" or "tend" to fix prices (*Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U.S. 86); whether a fire is "near" the public domain (*United States* v. *Alford*, 274 U.S. 264); whether income tax deductions are for "a reasonable allowance for salaries or other compensation for personal services actually rendered" (*United States* v. *Ragen*, 314 U. S. 513); see also *Screws* v. *United States*, 325 U.S. 91; *Williams* v. *United States*, 341 U.S. 97; *Nash* v. *United States*, 229 U.S. 373.

## CONCLUSION

For the foregoing reasons, the order of the District Court should be reversed.

PHILIP B. PERLMAN,
*Solicitor General.*
JAMES M. MCINERNEY,
*Assistant Attorney General.*
ROBERT L. STERN,
*Special Assistant to the Attorney General.*
BEATRICE ROSENBERG,
KENNETH C. SHELVER,
*Attorneys.*

FEBRUARY, 1952.

APPENDIX A

Section 23 of the Internal Security Act of 1950, 64 Stat. 1010.

SEC. 23. Section 20 of the Immigration Act of February 5, 1917, as amended (39 Stat. 890; 57 Stat. 553; 8 U. S. C. 156), is hereby amended to read as follows:

SEC. 20. (a) That the deportation of aliens provided for in this Act and all other immigration laws of the United States shall be directed by the Attorney General to the country specified by the alien, if it is willing to accept him into its territory; otherwise such deportation shall be directed by the Attorney General within his discretion and without priority of preference because of their order as herein set forth, either to the country from which such alien last entered the United States; or to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory; or to any country in which he resided prior to entering the country from which he entered the United States; or to the country which had sovereignty over the birthplace of the alien at the time of his birth; or to any country of which such an alien is a subject, national, or citizen; or to the country in which he was born; or to the country in which the place of his birth is situated at the time he is ordered deported; or, if deportation to any of the said foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such

alien into its territory. If the United States is at war and the deportation, in accordance with the preceding provisions of this section, of any alien who is deportable under any law of the United States, shall be found by the Attorney General to be impracticable or inconvenient because of enemy occupation of the country whence such alien came or wherein is located the foreign port at which he embarked for the United States or because of other reasons connected with the war, such alien may, at the option of the Attorney General, be deported (1) if such alien is a citizen or subject of a country whose recognized government is in exile, to the country wherein is located that government in exile, if that country will permit him to enter its territory; or (2) if such alien is a citizen or subject of a country whose recognized government is not in exile, then, to a country or any political or territorial subdivision thereof which is approximate to the country of which the alien is a citizen or subject, or with the consent of the country of which the alien is a citizen or subject, to any other country. No alien shall be deported under any provisions of this Act to any country in which the Attorney General shall find that such alien would be subjected to physical persecution. If deportation proceedings are instituted at any time within five years after the entry of the alien, such deportation, including one-half of the entire cost of removal to the port of deportation, shall be at the expense of the contractor, procurer, or other person by whom the alien was unlaw-

fully induced to enter the United States, or, if that cannot be done, then the cost of removal to the port of deportation shall be at the expense of the appropriation for the enforcement of this Act, and the deportation from such port shall be at the expense of the owner or owners of such vessels or transportation lines by which such aliens respectively came, or, if that is not practicable, at the expense of the appropriation for the enforcement of this Act. If deportation proceedings are instituted later than five years after the entry of the alien, or, if the deportation is made by reason of causes arising subsequent to entry, the cost thereof shall be payable from the appropriation for the enforcement of this Act. A failure or refusal on the part of the masters, agents, owners, or consignees of vessels to comply with the order of the Attorney General to take on board, guard safely, and transport to the destination specified any alien ordered to be deported under the provisions of this Act shall be punished by the imposition of the penalties prescribed in section 18 of this Act: *Provided*, That when in the opinion of the Attorney General the mental or physical condition of such alien is such as to require personal care and attendance, the said Attorney General shall when necessary employ a suitable person for that purpose, who shall accompany such alien to his or her final destination, and the expense incident to such service shall be defrayed in the same manner as the expense of deporting the accompanied alien is defrayed. Pending final determination of the deporta-

bility of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole. It shall be among the conditions of any such bond, or of the terms of release on parole, that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody and any other charges which subsequently are lodged against him, and for deportation if an order for his deportation has been made. When such an order of deportation has been made against any alien, the Attorney General shall have a period of six months from the date of such order within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on conditional parole, or upon bond in an amount and specifying such conditions for surrender of the alien to the Immigration and Naturalization Service as may be determined by the Attorney General. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States has not been effected, within six months from the date of the order of deportation the alien shall become subject to such further supervision and detention pending eventual depor-

tation as is authorized hereinafter in this section. The Attorney General is hereby authorized and directed to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain.

(b) Any alien, against whom an order of deportation, heretofore or hereafter issued, has been outstanding for more than six months shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall require any alien subject to supervision (1) to appear from time to time at specified times or intervals before an officer of the Immigration and Naturalization Service for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information whether or not related to the foregoing as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be

fined not more than $1,000 or shall be imprisoned not more than one year, or both.

(c) Any alien against whom an order of deportation is outstanding under (1) the Act of October 16, 1918, as amended (40 Stat. 1012, 41 Stat. 1008, 54 Stat. 673; 8 U. S. C. 137); (2) the Act of February 9, 1909, as amended (35 Stat. 614, 42 Stat. 596; 21 U. S. C. 171, 174-175); (3) the Act of February 18, 1931, as amended (46 Stat. 1171, 54 Stat. 673; 8 U. S. C. 156a); or (4) so much of section 19 of the Immigration Act of 1917, as amended (39 Stat. 889-890; 54 Stat. 671-673; 56 Stat. 1044; 8 U. S. C. 155) as relates to criminals, prostitutes, procurers or other immoral persons, anarchists, subversives and similar classes, who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or from the date of the enactment of the Subversive Activities Control Act of 1950, whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall connive or conspire, or take any other action, designed to prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years: *Provided*, That this sub-

section shall not make it illegal for any alien to take any proper steps for the purpose of securing cancellation of, or exemption from such order of deportation or for the purpose of securing his release from incarceration or custody: *Provided further,* That the court may for good cause suspend the sentence of such alien and order his release under such conditions as the court may prescribe. In determining whether good cause has been shown to justify releasing the alien, the court shall take into account such factors as (1) the age, health, and period of detention of the alien; (2) the effect upon the national security and public peace or safety; (3) the likelihood of the alien's following a course of conduct which made or would make him deportable; (4) the character of the efforts made by such alien himself and by representatives of the country or countries to which his deportation is directed to expedite the alien's departure from the United States; (5) the reason for the inability of the Government of the United States to secure passports, other travel documents, or deportation facilities from the country or countries to which the alien has been ordered deported; and (6) the eligibility of the alien for discretionary relief under the immigration laws.

(d) Should any alien subject to the provisions of subsection (c) unlawfully return to the United States after having been released for departure or deported pursuant to this section, the previous warrant of deportation against him shall be considered as reinstated from its original date of issuance.

(e) If any alien subject to this section is able to depart from the United States, except that he is financially unable to pay his passage, the expense of such passage to the country to which he is destined may be paid from the appropriation for the enforcement of this Act, unless such payment is otherwise provided for under this Act.

---

APPENDIX B

Form I-229
(Ed. I-26-51)

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

Date:
File No:

An order, of which you have been notified, directing your deportation from the United States was entered on ....., on the grounds that (date)

Arrangements to effect your deportation pursuant to such order are being made and when completed you will be notified when and where to present yourself for deportation.

In this connection you are reminded that Section 23 of the Internal Security Act of 1950, which was enacted by Congress on September 23, 1950, declares that any such alien "who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of

deportation, or from the date of the enactment of" that Act "whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall connive or conspire, or take any other action, designed to prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years. Provided, That this subsection shall not make it illegal for any alien to take any proper steps for the purpose of securing cancellation of or exemption from such order of deportation or for the purpose of securing his release from incarceration or custody: * * *"

Therefore, you will recognize the importance of making every effort in good faith to obtain passport or other travel documents so that you may effect your departure pursuant to the said order of deportation within the time prescribed by the quotation above from the Internal Security Act of 1950.

Very truly yours,

Form I-228
(Ed. I-26-51)

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

Date: .....
File No: .....

My name is .....
My address is .....
I acknowledge that I have been notified that an order for my deportation from the United States to ..... was entered on .....
on the grounds that (Date)

Section 20(a) of the Immigration Act of 1917, as amended by the Internal Security Act of 1950, provides that the deportation of aliens shall be directed to the country specified by the alien, if it is willing to accept him into its territory; otherwise, such deportation will be directed by the Attorney General to some other country.

Therefore, I specify ..... as the country of my choice.

I ( have / have not ) applied for and ( have / have not ) received necessary permission to enter that country.

I understand that the Immigration and Naturalization Service will assist me in applying for permission for entry into the country specified by me, but if that country is not willing to permit my entry, I will be deported pursuant to law.

(Signature) .....

(Witness) .....

(Title) .....

Immigration and Naturalization Service

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IN THE

# Supreme Court of the United States

October Term, 1951.

No. 443

UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

EFROIM SPECTOR,

*Appellee.*

## BRIEF FOR THE APPELLEE.

MARGOLIS & MCTERNAN,
112 West Ninth Street,
Los Angeles 15, California,
*Counsel for Appellee.*

A. L. WIRIN,
Attorney, American Civil Liberties Union,
Southern California Branch,
Los Angeles, California,
*Of Counsel.*

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

## SUBJECT INDEX


| | PAGE |
|---|---|
| Opinion below | 1 |
| Question presented | 1 |
| Statute involved | 2 |
| Summary of argument | 2 |
| Argument | 3 |
| I. | |
| The statute is void for vagueness in the respects found by the trial court | 3 |
| A. The questioned clause lacks any ascertainable standard of guilt | 5 |
| B. The questioned clause fails to define clearly what duty is imposed upon the persons affected | 10 |
| C. The fact that the statute punishes only wilful violations is not enough to overcome its deficiencies | 15 |
| II. | |
| In addition to the grounds relied upon by the trial court, the statute is fatally uncertain in other respects | 16 |
| A. This court will review grounds of attack upon the statute which were rejected by the trial court | 16 |
| B. Section 20(c) fails to define sufficiencly the persons subject to its terms | 17 |
| Conclusion | 25 |

# TABLE OF AUTHORITIES CITED


| CASES | PAGE |
|---|---|
| American Communications Assn. v. Douds, 339 U. S. 382 | 16, 24 |
| Arnold v. United States, 115 F. 2d 523 | 24 |
| Barsky v. United States, 167 F. 2d 241 | 23 |
| Boyce Motor Lines, Inc. v. United States, 96 L. Ed. (Adv. Ops.) 249 | 3, 14 |
| Champlin Refining Co. v. Corp. Comm., 286 U. S. 210 | 3 |
| Cline v. Frink Dairy, 274 U. S. 445 | 4 |
| Collins v. Kentucky, 234 U. S. 634 | 14 |
| Connally v. General Construction Co., 269 U. S. 385 | 3, 15, 24 |
| Delgadillo v. Carmichael, 332 U. S. 388 | 14 |
| First National Bank v. United States, 206 Fed. 273 | 24 |
| Gorin v. United States, 312 U. S. 19 | 4, 9, 15 |
| Hygrade Provision Co. v. Sherman, 266 U. S. 497 | 3, 15 |
| International Harvester Co. v. Kentucky, 234 U. S. 216 | 3 |
| Jordan v. DeGeorge, 341 U. S. 223 | 19 |
| Lanzetta v. New Jersey, 306 U. S. 451 | 4, 24 |
| Mahler v. Eby, 264 U. S. 32 | 4 |
| Nash v. United States, 229 U. S. 373 | 3, 15 |
| Omaechevarria v. Idaho, 246 U. S. 343 | 3 |
| Screws v. United States, 325 U. S. 91 | 4, 15 |
| Sproles v. Binford, 286 U. S. 374 | 3 |
| Tan v. Phelan, 333 U. S. 6 | 18 |
| Thornhill v. Alabama, 310 U. S. 88 | 24 |
| United States v. Curtiss-Wright Export Co., 299 U. S. 304 | 16 |
| United States v. Evans, 333 U. S. 483 | 14, 20 |
| United States v. Josephson, 165 F. 2d 82 | 23 |

PAGE

United States v. L. Cohen Grocery Co., 255 U. S. 81 ..... 4, 15

United States v. Petrillo, 332 U. S. 1 ..... 24

United States v. Ragen, 314 U. S. 513 ..... 4, 9

United States v. Reese, 92 U. S. 214 ..... 4, 9

United States v. Winchester, 40 F. 2d 472 ..... 24

Winters v. New York, 333 U. S. 507 ..... 16

MISCELLANEOUS

Action Taken by Governments on the Recommendations Adopted by the Second Conference on the International Regime of Passports, Advisory and Technical Commission for Communications and Transit, League of Nations, Geneva, 1929 ..... 11

House Report 1192, 81st Cong., 1st Sess. ..... 13

House Report 1192, 81st Cong., 1st Sess., p. 9 ..... 18

Inter-Governmental Committee on Refugees, Preparatory Documents Concerning the Adoption of an Identity and Travel Document for Refugees Coming Within the Mandate of the Inter-Governmental Committee, London, 1946 ..... 11

Minutes of Plenary Meetings, Passport Conference, League of Nations, May, 1926 ..... 11

Passport Regulations of Foreign Countries (Govt. Printing Office, 1897) ..... 11

Senate Report 1515, 81st Cong., 2d Sess., pp. 157, 815 ..... 12

Senate Report 1515, 81st Cong., 2d Sess., p. 158 ..... 13

Senate Report 2239, 81st Cong., 2d Sess. ..... 13

STATUTES

Alien Registration Act (54 Stat. 673, 8 U. S. C. 451) ..... 13

8 Code of Federal Regulations, Sec. 151.2(c) ..... 6

49 Code of Federal Regulations, Sec. 197.02 ..... 14

PAGE

Immigration Act of February 5, 1917, Sec. 19 ..... 17

Immigration Act of February 5, 1917, Sec. 20 ..... 2

Immigration Act of February 5, 1917, Sec. 20(a) ..... 7

Immigration Act of February 5, 1917, Sec. 20(c) .....
..... 1, 2, 6, 9, 12, 13, 14
16, 17, 18, 20, 21, 22, 23

Internal Security Act of 1950 (8 U. S. C., Sec. 782) ..... 23

Internal Security Act of 1950, Sec. 23 (64 Stat. 1010, 8 U. S. C., Supp. IV, 156(c)) ..... 1, 2

Legislative Reorganization Act of 1946 (60 Stat. 828) ..... 23

Subversive Activities Control Act (64 Stat. 1010) ..... 17

United States Code, Title 8, Sec. 138 ..... 21

United States Code, Title 8, Sec. 155 ..... 17, 18, 19, 20, 21, 22, 23

United States Code, Title 18, Sec. 2385 ..... 19

United States Code, Title 28, Chap. 6, Secs. 100-246 ..... 18

United States Constitution, Fifth Amendment ..... 5, 24

United States Constitution, Sixth Amendment ..... 24

TEXTBOOKS

Webster's New International Dictionary, Second Edition ..... 10, 22

Wolfson and Kurland, Jurisdiction of the Supreme Court of the United States, p. 335 ..... 16

IN THE

# Supreme Court of the United States

October Term, 1951.

No. 443

UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

EFROIM SPECTOR,

*Appellee.*

## BRIEF FOR THE APPELLEE.

### Opinion Below.

The opinion of the District Court dismissing the second and fourth counts of the indictment [R. 8-13] appears at 99 Fed. Supp. 778.

### Question Presented.

Section 20(c) of the Immigration Act of February 5, 1917, as amended by Section 23 of the Internal Security Act of 1950, 64 Stat. 1010, 8 U. S. C., Supp. IV, 156(c), establishes various criminal offenses for certain classes of aliens ordered deported under various provisions of the immigration and deportation laws. The question in this case is whether Section 20(c) is so uncertain and vague as to fall short of satisfying the requirements of the due process clause of the Fifth Amendment.

## Statute Involved.

Section 20 of the Immigration Act of February 5, 1917, as amended by Section 23 of the Internal Security Act of 1950, *supra*, is set forth in full in Appendix A to the government's brief herein, at pages 25-32.

## Summary of Argument.

The particular clause of Section 20(c) held by the trial court to be "void for vagueness" provides that any alien within the prescribed classes who "shall wilfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure . . . shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years." The judgment below was right in finding this clause fatally uncertain in failing to specify the nature of the travel documents required to be sought by the alien and the country, or the number of countries to which the alien was required to make application. In addition the clause lacks constitutional clarity with respect to the time or stage at which the alien must act if he is to avoid prosecution and punishment under it. Moreover, the clause is an integral part of a section which throughout is characterized by fundamental uncertainties. Thus it is impossible to determine from the section or its context to what aliens or classes of aliens its several penal provisions are applicable. None of these deficiencies is cured by the limitation of the punishment to wilful non-compliance in bad faith. Since the section establishes new offenses and requires affirmative conduct its directions must be clear and specific. Because they are not, Section 20(c) in its entirety is fatally uncertain and all four counts of the indictment should have been dismissed.

## ARGUMENT.

### I.

### The Statute Is Void for Vagueness in the Respects Found by the Trial Court.

Of necessity, the validity of a statute challenged for want of the clarity and definiteness required by the due process clause hinges upon the choice and arrangement of the words selected by the legislature. The variety of language being infinite, especial caution is necessary in generalizing from the many decisions in this constitutional area.

Perhaps the clearest summary of the several tests evolved by this Court is that made by Mr. Justice Sutherland in *Connally v. General Construction Co.*, 269 U. S. 385, 391. The opinion there found that statutes of questioned certainty have survived attack when they "employed words or phrases" classified as follows:

(1) "having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them." Illustrative cases cited were *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, and *Omaechevarria v. Idaho*, 246 U. S. 343. To these might be added *Sproles v. Binford*, 286 U. S. 374, and *Boyce Motor Lines, Inc. v. U. S.*, 96 L. Ed. (Adv. Opp.) 249;

(2) having "a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ," citing *Nash v. U. S.*, 229 U. S. 373, and *Int'l Harvester Co. v. Ky.*, 234 U. S. 216, to which might be added *Champlin Refining Co. v. Corp. Commission*, 286 U. S. 210; or

(3) from which, "'for reasons found to result either from the text of the statute involved or the subjects with which they dealt, a standard of some sort was afforded.'" *U. S. v. L. Cohen Grocery Co.*, 255 U. S. 81, 92. Other cases in this group would include *Mahler v. Eby*, 264 U. S. 32; *Gorin v. U. S.*, 312 U. S. 19; *U. S. v. Ragen*, 314 U. S. 513.

Landmark cases illustrative of legislation failing by all of these tests are *Lanzetta v. N. J.*, 306 U. S. 451; *Cline v. Frink Dairy*, 274 U. S. 445, and *Connally* itself. They reaffirmed the dictum of *U. S. v. Reese*, 92 U. S. 214, 220, that especially when it defines a new offense the legislature must speak with unmistakable certainty.

Since the clarity of a statute is an objective matter, want of it is not supplied by even the clearest requirement of a subjective intent on the part of the person affected. While such a requirement may avoid punishments for offenses "of which the accused was unaware," it "may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain." (*Screws v. U. S.*, 325 U. S. 91, 102.) "Of course, wilful conduct cannot make definite that which is undefined." (*Idem.*, 105.)

Within the framework of these well settled principles we turn to an examination of the statute in question here. We shall deal first with the clause held by the trial court to be too vague and uncertain to meet constitutional requirements. In a subsequent section of this brief we shall discuss other provisions of the statute.

**A. The Questioned Clause Lacks Any Ascertainable Standard of Guilt.**

The clause of the statute which the trial court held to be lacking in the definiteness required by the due process clause, and upon which counts two and four of the indictment were based, purports to punish an alien awaiting deportation who "shall wilfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure." This is one of four clauses in the section, each of which is apparently intended to establish as a separate offense certain types of conduct or omissions on the part of such an alien. Considered independently as a definition of a crime upon which indictment and prosecution may be predicated, the clause in question plainly lacks that certainty which the Fifth Amendment requires.

The alien is told that he must make "timely application" for documents. Within the limits of the clause itself, however, there is nothing which tells him at what point he must act, or when his application is or is not "timely." No affirmative command elsewhere in the statute fills this gap. This is not a case where the legislature has imposed criminal sanctions upon failure to carry out a previous direction or to obey an earlier stated prohibition. Unless the alien can determine what he must do and when it must be done from the language of the penal provision itself, he is left wholly without a guide as to his duty.

The trial court construed the clause in question by reading it in connection with the preceding clause punishing the alien "who shall wilfully fail and refuse to depart from the United States within a period of six months from the date" of his deportation order, or of enactment

of the Subversive Activities Control Act of 1950 (Sept. 23, 1950), whichever is later. The very fact that resort to another clause, stating a separate and independent offense, is necessary bears testimony to the failure of the Congress to define the crime in question here with self-sufficient positiveness.

Assuming, however, that the trial court's construction was a proper one, the meaning of the provision still remains obscure. Putting aside for later analysis the question of what duty is imposed, there remains the gravest doubt as to when it attaches.

In its brief the government points out that Section 20(a) permits the alien to specify the country to which he shall be deported. But this is a privilege which the alien may or may not choose to exercise. Election is not mandatory, 8 C. F. R. 151.2(c). If the alien chooses not to designate any country, the question arises at what point he must "make timely application" to some. The government in its brief (pp. 17, 18, 19, 20, 21) repeatedly asserts that in such a situation the Attorney General "will have selected a country for deportation" and "will normally advise the alien of his decision and ask him to obtain or fill out whatever documents are necessary" (Govt. Br. p. 19). But while the statute doubtless permits the Attorney General to do this, it does not require it. No obligation to notify the alien of the country of deportation is imposed upon the government. In its brief the government acknowledges that "where a 'refusal' is charged *there must be proof that the alien has been told what he must do*" (Govt. Br. p. 21; emphasis supplied). Hence the statute lacks what the government's theory in effect concedes to be an essential ingredient of the offense.

If the questioned clause read as the government reads it, its definiteness might never have been attacked. Had it directed the alien to make prompt application for admission to any country designated to him by the Attorney General on pain of criminal punishment for his refusal, a different issue would be presented. This in substance is what the government says the statute means. But this is not what it says. On the contrary, it requires him to make "timely application . . . for travel or other documents necessary to his departure." When, where, to whom, for what, how many times, are questions left open and unanswered.

The government suggests that should the Attorney General fail to inform the alien of the country of deportation, an eventuality which it discounts, "the alien would seem to have an affirmative duty to choose some country and to apply thereto for travel documents" (Govt. Br. p. 20). If so, there is a conflict between the questioned clause and Section 20(a) which, as already noted permits the alien to designate a country or not as he chooses. Let us suppose, however, that the alien makes application to country A. While it is pending the Attorney General notifies him that country X has been designated as the country of deportation. Must the alien then also make application to country X? Or has he already satisfied the requirements of the statute? If country A rejects his application, must the alien then apply successfully to countries B, C, D, E, and so on? The government would answer in the affirmative, but the answer is not to be found in the language of the statute.

Indeed the Immigration and Naturalization Service itself demonstrates something less than perfect understand-

ing of the statute's operation. Its Form I-229 (Govt. Br., App. B, pp. 32-33) contains the following paragraphs:

> "Arrangements to effect your deportation pursuant to such order are being made and when completed you will be notified when and where to present yourself for deportation.
>
> * * * * * * * *
>
> "Therefore, you will recognize the importance of making every effort in good faith to obtain passport or other travel documents so that you may effect your departure pursuant to the said order of deportation within the time prescribed by the quotation above from the Internal Security Act of 1950."

The recipient of this form is not told when he should begin "making every effort to obtain" travel documents. If he proceeds to do so at once, and is successful, he may be unable to present himself "for deportation" as the first paragraph directs. If "arrangements to effect [his] deportation . . . are being made," it may be unnecessary for him to make independent efforts to depart. Yet if he awaits notification to report for deportation, he may be subject to prosecution for failure to make "timely application" for travel documents. The perplexing features of the statute are mirrored in the administrative application.

We are told that the section's purpose, as evidenced by the legislative history, was to accomplish deportation

where the government has been unable to effect it. In lieu of official process the alien is directed to bring about personally the result which government, with all of its power and resources, has been powerless to achieve. In effect, the Congress has said,

> "When you have been ordered deported, you must depart yourself, somehow or other. It is up to you to figure out how to do this and if you don't you may be guilty of a felony."

Policy and equity considerations aside, we submit that no such mandate furnishes an adequate guide to the persons affected. If the alien can be compelled at all to do what the government is unable to do, the due process clause requires that the directions given him be unmistakably clear and definite. This the statute obviously is not.

Section 20(c), according to the legislative reports (Govt. Br. pp. 6-12), represents a new departure in immigration and deportation legislation. The offenses which it purports to establish have no precedent in our law, in contrast to those defined in such cases as *Gorin v. U. S.*, 312 U. S. 19, and *U. S. v. Ragen*, 314 U. S. 513. Where the legislature undertakes "to define by statute a new offense and provide for its punishment, it should express its will in language that need not deceive the common mind." (*U. S. v. Reese*, 92 U. S. 214, 220.) The present statute is a trap for the unwary and a puzzle for the astute. The judgment of the trial court, while unduly narrow, was correct and should be affirmed.

**B. The Questioned Clause Fails to Define Clearly What Duty Is Imposed Upon the Persons Affected.**

In its brief the government brushes aside the trial court's finding that the phrase "for travel or other documents necessary to his departure" is fatally uncertain. It contends that "travel documents" in the context of the section "can have no other meaning except those official documents required in order lawfully to enter another nation." (Govt. Br. p. 15).

Again the government recasts the statute. The questioned clause does not speak of documents needed "to enter another nation." It talks of documents "necessary to his *departure*" (emphasis supplied). Hence Judge Mathes' query as to the sufficiency of purchasing a bus ticket to Tijuana, Mexico is apt, since such a document would effect "departure." The government suggests that a ticket is not properly described as a "document." But an approved dictionary definition of the term describes it as "A *document* which serves as a certificate, license, permit or the like; a voucher." Webster, New International Dictionary, 2d Edition (emphasis supplied).

We are told that in the context of the statute the phrase is sufficiently defined as "passports, other travel documents or deportation facilities" (Govt. Br. p. 16). We are also referred to one other federal statute which uses the term (*Idem*, p. 15, footnote 6).

The very fact that the phrase appears so seldom in our law testifies both to its novelty and to the absence of a gloss such as might be wrought by frequent use. On the other hand, reference to the requirements of the countries of the world for admission to their territories readily discloses a vast variety of "documents" employed in con-

nection with international passage. Indeed, this very question has been the subject of a number of international conferences.[1]

Cursory examination of the reports and proceedings of these conferences reveals that a dozen or more different types of documents are utilized by various countries of the world in connection with admissions to their territories. They include passports (individual and collective or family), transit visas, transit cards, identity coupons, entrance or entry visas, consular visas, passport visas, immigration visas, preliminary visas, certificates (Denmark, Uruguay), identity documents and border crossing cards (U. S.).[2] Various proposals for adoption of a common international certificate, such as an emigrant's identity book, have been proposed[3] but none has been adopted. In 1897 the Government Printing Office issued a summary of the passport regulations of some forty foreign countries[4] but this compendium has not been kept up to date, and no similar publication appears to have been issued during the ensuing 55 years.

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[1]See Minutes of Plenary Meetings, Passport Conference, League of Nations, May, 1926; Action Taken By Governments on the Recommendations Adopted By The Second Conference On The International Regime of Passports, Advisory and Technical Commission for Communications and Transit, League of Nations, Geneva, 1929; Inter-Governmental Committee On Refugees, Preparatory Documents Concerning The Adoption of an Identity and Travel Document For Refugees Coming Within the Mandate of the Inter-Governmental Committee, London, 1946.

[2]See proceedings of conferences referred to in footnote 1, *supra*.

[3]Minutes of Plenary Meetings, Passport Conference. League of Nations, *supra*, p. 21.

[4]Passport Regulations of Foreign Countries, Government Printing Office, 1897.

Thus the alien affected by the questioned clause of Section 20(c) is confronted with the necessity of threading his way through a maze of regulations, varying from country to country. The complexities of even casual international travel are commonly known. Multiplied many fold in the case of one seeking admission to permanent residence in a strange land, they confront the alien with a bewildering confusion.

The government contends that aliens affected by the statute retain such ties with the country of their origin as to be "in a peculiarly favorable position to know the meaning of travel and other documents necessary for departing from one country for another" (Govt. Br. p. 16). The assumption seems to be that all or most resident aliens are recent arrivals in the United States who retain close connections with their native lands or other countries in which they may have lived. This assumption is not supported by anything in the legislative record and is contrary to readily ascertainable facts. The tide of immigration into the United States reached its peak prior to the First World War and has receded steadily ever since, to the accompaniment of ever increasing restrictions upon entry.[5] While many of those who came here a generation or more ago have become naturalized, many for various reasons have not. Thus hundreds of thousands of

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[5]The numbers of aliens admitted to the United States by decades since 1901 is as follows: 1901-1910, 8,795,386; 1911-1920, 5,735,811; 1921-30, 4,107,209; 1931-40, 528,431. S. Rep. 1515, 81st Cong., 2d Sess., pp. 157, 815.

aliens now living in the United States came here with their parents as children, and have lived here a generation or more. Some 60% are more than 45 years old.[6] Illustratively, the defendant in the case at bar, as the record shows, came to the United States in 1913, and has lived his entire adult life here [R. 6, 8]. The same would seem to be true with respect to a number of the other aliens whose cases are mentioned in the Committee reports.[7]

Thus it is not the fact, as the government asserts, that those within the reach of section 20(c) are "in a peculiarly favorable position" to know what "travel and other documents" are and how to obtain them. On the contrary, those who came here as children can have understood little or nothing about the mechanics of their admission. Those who came a generation or more ago, even as young adults, have long since forgotten. Nor do such expatriates necessarily retain close ties with their former homes. To most if not all, this country is home—often the only one they know, the only one where living human roots exist.

By the same token, due to a complex of social factors, the alien even after many years of residence often remains "a stranger in a strange land." Especially among the older groups, education frequently is limited and experience confined to that of working people generally. The foreign born thus are among those least able to cope with "official

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[6]Of the 5,009,857 aliens registered under the Alien Registration Act (54 Stat. 673, 8 U. S. C. 451 *et seq.*) as of December 26, 1940, 2,901,995 or 57.92% were 45 years of age or more. The median age was 52.9 years. S. Rep. 1515, 81st Cong., 2d Sess., p. 158. Considered together with the figures on admissions to the U. S. (footnote 5, *supra*), these statistics make it apparent that a very large proportion of the alien population has been resident here for long periods of years.

[7]H. Rep. 1192, 81st Cong., 1st Sess.; S. Rep. 2239, 81st Cong., 2nd Sess.

documents" and the procedures by which they are procured. Instead of being advantaged by their birth they face peculiar handicaps in attempting to unravel the mysteries of international intercourse. (See *Delgadillo v. Carmichael*, 332 U. S. 388.)

The case thus is entirely unlike *Boyce Motor Lines v. U. S.*, 96 L. Ed. (Adv. Ops.) 249, where the defendant carrier was charged under a regulation adopted for his own industry with the active participation of industry representatives. The employers of every affected carrier have to be conversant with its terms. (49 C. F. R. 197.02.) Thus the defendant in *Boyce* was indeed "in a peculiarly favorable position to know the meaning" of the regulation. The contrary is the case with aliens subject to Section 20(c).

There remains, as the trial court pointed out, the further question whether the statute requires persons affected to make application only to one country or to all countries represented by consulates or otherwise in the city, country or state of the alien's residence, or by embassies and legations maintained in the capital. How far the alien must go, on how many doors he must knock, how many rebuffs he must receive before he has discharged his obligations under the statute, no one can tell. If "departure" is all that is required, as the face of the statute declares, he might stop when he has secured appropriate authority to leave the United States. This would not effect his deportation, which is the object of the law. To accomplish that might require numerous applications to each of a large number of countries. Even if effort and not success is the only demand, the stopping point is unmarked, left to conjecture. (*Collins v. Kentucky*, 234 U. S. 634, 638; see *U. S. v. Evans*, 333 U. S. 483, 486-488.)

**C. The Fact That the Statute Punishes Only Wilful Violations Is Not Enough to Overcome Its Deficiencies.**

The faults of the statute are the greater, as the trial court noted, since it in effect requires affirmative action. And the inclusion of the element of bad faith is not enough to overcome them. While it is true that "A mind intent upon wilful evasion is inconsistent with surprised innocence," (*U. S. v. Ragen*, 314 U. S. 513, 524, a mind intent upon bona fide compliance is compatible with bewildered uncertainty. The best intentions in the world are no substitute for inadequate performance.

> "The requirement that the act must be wilful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects undefined."
>
> *Screws v. U. S.*, 325 U. S. 91, 102.

Analysis of the cases shows that this Court has consistently held that there must be an area in which application of the statute is clear by virtue either of common experience (*e. g., Hygrade Provisions Co. v. Sherman, supra*), of well settled common law meaning (*e. g., Nash v. U. S., supra*), or of the text or subject of the statute itself (*e. g., U. S. v. L. Cohen Grocery Co., supra*). Where such a central core of clear definition is present, problems of the application of the legislation on the periphery are met by the scienter test. But "wilful conduct cannot make definite that which is undefined" (*Screws v. U. S., supra*, at 105). For if there is no area of certainty the state of mind is irrelevant, since no one can tell what is required or prohibited and "men of common intelligence must necessarily guess at its meaning and differ as to its application" (*Connally v. General Construction Co.*, 269 U. S. 385, 391).

## II.

## In Addition to the Grounds Relied Upon by the Trial Court, the Statute Is Fatally Uncertain in Other Respects.

The judgment of the trial court, holding invalid the clause of Section 20(c) on which the second and fourth counts of the indictment were based, rests upon narrow grounds. It wholly ignores other deficiencies in the section which the appellee deems equally critical. We turn now to an examination of these, prefaced by brief reference to the authorities supporting our right to assert such related grounds.

### A. This Court Will Review Grounds of Attack Upon the Statute Which Were Rejected by the Trial Court.

In reviewing the judgment below, this Court will be called upon to examine "the entire text of the statute" (*Winters v. New York*, 333 U. S. 507, 518), in order to appraise its context (*American Communications Assn. v. Douds*, 339 U. S. 382). So doing, it will of necessity confront questions of the clarity and definiteness of other provisions of the section of which the questioned clause is an integral part.

Moreover, if this Court should disagree with the conclusions of the trial court, it will review grounds in support of the judgment which were rejected below (*United States v. Curtiss-Wright Export Co.*, 299 U. S. 304; Wolfson and Kurland, *Jurisdiction of the Supreme Court of the United States*, page 335).

It follows that appellee may properly urge here additional uncertainties in Section 20(c) which render it fatally deficient.

**B. Section 20(c) Fails to Define Sufficiently the Persons Subject to Its Terms.**

Section 20(c) establishes four separate offenses of which certain deportable aliens may be convicted. The aliens subject to its terms are classified according to the legislative foundation of the deportation orders outstanding against them. Three of these are clearly stated, being respectively the Act of October 16, 1918, as amended, the Act of February 9, 1909, as amended, and the Act of February 18, 1931, as amended. The fourth, however, is couched in the following terms:

> "(4) so much of section 19 of the Immigration Act of 1917, as amended (39 Stat. 889-890; 54 Stat. 671-673, 56 Stat. 1044; 8 U. S. C. 155) as relates to criminals, prostitutes, procurers or other immoral persons, anarchists, subversives and similar classes."

Under this last clause it becomes necessary to examine Section 19 of the Immigration Act of 1917, as amended, in order to determine if possible what part or parts of that statute relate to the types and classes of persons listed.

Section 19 appears in Title 8 of the United States Code as Section 155. It constitutes the major statutory scheme[8] for the deportation of undesirable aliens, and defines classes of aliens made subject to deportation. The section nowhere employs as terms of classification the words "criminals, prostitutes, procurers or other immoral persons, anarchists, subversives," which are used as such in Section 20(c). In order to explore their meaning and application, therefore, Section 155 must be analyzed in some detail.

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[8]Prior to the enactment of the Subversive Activities Control Act, 64 Stat. 1010, which substantially enlarged the sweep of the Act of October 16, 1918.

*"Criminals."* Certain of the provisions of Section 155 deal in express terms with persons convicted of crime. Other provisions classify as deportable, aliens committing certain acts in violation of law without reference to their prosecution or conviction for those acts. At the threshold of the inquiry, therefore, ambiguity is encountered since Section 20(c) fails to indicate whether the term "criminals" is intended to mean only those who have been convicted after prosecution or to include those who have committed an infraction of law, without reference to prosecution and conviction.[9]

Putting aside this underlying uncertainty, Section 155 is found to contain the following definitions of aliens who may or may not be said to come within the Section 20(c) classification "criminals." It lists as deportable "any alien who shall have entered or who shall be found in the United States in violation of this chapter [Title 8, U. S. C., ch. 6, secs. 100-246] or in violation of any other law of the United States." It likewise includes aliens sentenced to imprisonment for a term of one year or more "because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States," and aliens sentenced more than once to imprisonment for terms of a year or more "because of conviction in this country of any crime involving moral turpitude, committed at any time after entry." Also declared deportable are aliens

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[9] The legislative history suggests a purpose to use the term as synonymous with "confirmed criminal," or "habitual criminal." H. Rep. 1192, 81st Cong., 1st Sess., p. 9. See *Tan v. Phelan*, 333 U. S. 6. But no such limitation is expressed or implied in the statute itself and it would, in any event, hardly solve the problem.

convicted or who admit the commission prior to entry "of a felony or other crime or misdemeanor involving moral turpitude."

It may be noted that Section 155 requires the deportation of aliens guilty of "crimes involving moral turpitude" committed before as well as after entry into this country; thus it applies to aliens guilty of such offenses in any part of the world. It is an exacting task at best to determine whether a crime committed in this country involves "moral turpitude," defined as conduct failing to accord with "moral standards that prevail in contemporary society," *Jordan v. DeGeorge*, 341 U. S. 223, Jackson, J., dissenting, pages 237-238. As Mr. Justice Jackson there pointed out, moral standards differ in different parts of the United States. To determine the moral standards that prevail in different parts of the world, varying as they do not only from those in the United States but from each other, is an insuperable task. Moreover, since the statute applies not only to aliens convicted prior to entry but to those who admit the commission of such a crime prior to entry, there is no possible way of determining whether the moral views, or the courts, of the country where the act was committed would hold that it constituted either a criminal offense or immoral conduct.

The section also authorizes deportation of "any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States or of all forms of law or the assassination of public officials . . ." Some, at least, of these acts constitute crimes under other statutes. (See, *e. g.*, 18 U. S. C., Section 2385.)

Whether it is the purpose of Congress in Section 20(c) to reach aliens ordered deported under this clause as "criminals," as "subversives" or at all, however, it is impossible to determine from the provisions of the statute. (See *U. S. v. Evans*, 332 U. S. 483.)

*"Prostitutes."* The common meaning of this term is familiar enough, and if it were the only word used for the purpose in Section 155 no serious difficulty would be presented. The section, however, classes as deportable not only aliens found to be inmates of houses of prostitution and practicing prostitution, but others whose connection with such activity is more or less remote. Thus, the section applies to "any alien . . . connected with the management of a house of prostitution," to "any alien who manages or is employed by, in or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes or where prostitutes gather"; and to any alien "who in any way assists any prostitute or protects or promises to protect from arrest any prostitute." Can it be said with any certainty that aliens ordered deported upon any or all of these grounds were or were not intended to be covered by Section 20(c) when it speaks of "so much of" Section 155 "as relates to . . . prostitutes"? Or are these classes of aliens within the catch-all, "or other immoral persons"?

The same questions arise with respect to the clause of Section 155 requiring the deportation of "any alien who, after being excluded and deported or arrested and deported as a prostitute, or as a procurer, or as having been connected with the business of prostitution or importation for prostitution or other immoral purposes in any of the ways hereinbefore specified, shall return to

and enter the United States." Is Section 20(c) to be read as incorporating this clause and thus as applicable to ex-"prostitutes," ex-"procurers" and formerly "immoral persons" who may have mended their ways? Logical arguments could be made for either result.

*"Procurers."* A procurer is defined as "One whose business it is to supply women to seducers or houses of ill fame; a pander; a pimp." Webster, New International Dictionary, Second Edition. Nothing in Section 20(c) or Section 155 suggests that Congress employed the term in any different meaning. Yet Section 155 in addition to listing activities within this definition, also includes any alien "who in any way assists any prostitute or protects or promises to protect from arrest any prostitute." It covers "any alien who shall import or attempt to import any person for the purpose of prostitution or for any other immoral purpose." In addition, it applies to "any alien convicted and imprisoned for a violation of any of the provisions of Section 138 of this title" (8 U. S. C.), a section which imposes criminal penalties for importing or attempting to import aliens "for the purpose of prostitution or for any other immoral purpose," and various other offenses related to the practice of prostitution and the maintenance of houses of prostitution. We are furnished with no guide whatever for determining whether Section 20(c) is operative against aliens ordered deported under any of these provisions.

*"Other Immoral Persons."* The vagueness of this phrase is self-evident. It is compounded by the fact that the same phrase appears in the reference statutes, Sections 155 and 138, without other elucidation. Moreover, the deficiencies characteristic of the term "crime involv-

ing moral turpitude" are present in equal degree in this phrase. It seems obvious that Congress did not intend to subject to the stringent requirements of Section 20(c) aliens employed as musicians in dance halls. Yet Section 155, to which it refers, authorizes the deportation of such persons.

*"Anarchists."* Webster defines an anarchist as "one who advocates anarchy or believes in anarchism . . ." Anarchy is defined as "absence of government . . ." The preferred definition of anarchism is:

> "1. The theory that all government is an evil . . . At its best, it stands for a society in which each person produces according to his powers and receives according to his needs. At its worst, it stands for a terroristic resistance to all present government and social order . . ." (Webster, New International Dictionary, Second Edition.)

Section 155 classes as deportable "any alien who at any time after entry shall be found . . . advocating or teaching anarchy . . ." Presumably this would include those teaching anarchy "at its best" as well as those advocating its most extreme form. But this phrase occurs in the middle of a clause establishing various other classes of deportable aliens in the following language:

> "any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States or of all forms of law or assassination of public officials; . . ."

Does Section 20(c) cover aliens ordered deported under each of these provisions? The statute furnishes no answer.

The remaining categories incorporated in Section 20(c) by reference to Section 155 are "subversives and similar classes." The term "subversive" appears to have first been used, in a statute, in the Legislative Reorganization Act of 1946 (60 Stat. 828), which authorized the House Committee on Un-American Activities to investigate "the diffusion . . . of subversive and un-American propaganda that . . . attacks the principles of the form of government as guaranteed by our Constitution . . ." The term is defined neither in that act nor elsewhere in the Criminal Code. It is not included among the definitions of terms employed in the Internal Security Act of 1950 (8 U. S. C., Sec. 782). In practice it is used to cover so wide a variety of views that it must be taken now to mean nothing more than political heterodoxy. (See Edgerton, J., dissenting, *Barsky v. United States* (C. A. D. C., 1948), 167 F. 2d 241, 252-263; Clark, J., dissenting, *United States v. Josephson* (C. A. 2, 1947), 165 F. 2d 82, 93-100.)

The phrase "similar classes" appears to modify each of the classifications listed in Section 20(c). Since they are not only vague in themselves but belong to no common category, this phrase merely compounds the confusion.

Authority is hardly needed for the proposition that a statute, if it is to satisfy the due process clause, must be plain and definite not only as to what it requires or pro-

hibits, but as to the persons "who are subject to it" (*Connally v. General Construction Co.*, 369 U. S. 385, 391), "those to whom the statute is directed" (*American Communications Assn. v. Douds*, 339 U. S. 382, 412). If the persons charged with a duty are not clearly designated by the statute, the legislation fails to meet the requirements of the Fifth and Sixth Amendments. (*First National Bank v. United States* (C. C. A. 8, 1913), 206 Fed. 273; see *United States v. Winchester* (C. C. A. 2, 1930), 40 F. 2d 472; *Arnold v. United States* (C. C. A. 8, 1940), 115 F. 2d 523.)

It is no answer here that the indictment below alleged that appellee was ordered deported under the Act of October 16, 1918 [R. 1], and that the uncertainties described above are not present in this case. This is a challenge of the statute on its face, and it is "the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." (*Lanzetta v. New Jersey*, 306 U. S. 451; 453; *United States v. Petrillo*, 332 U. S. 1; *Thornhill v. Alabama*, 310 U. S. 88, 97-98.)

> "An accused . . . does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him." (*Thornhill v. Alabama*, op. cit., *supra*.)

## Conclusion.

For all the foregoing reasons the judgment of the District Court dismissing counts two and four of the indictment should be affirmed and the order denying the motion to dismiss counts one and three of the indictment should be reversed with directions to grant the motion.

MARGOLIS & MCTERNAN,
By JOHN W. PORTER,
Los Angeles, California,
*Counsel for Appellee.*

A. L. WIRIN,
Attorney, American Civil Liberties Union,
Southern California Branch,
Los Angeles, California,
*Of Counsel.*

Service of the within and receipt of a copy thereof is hereby admitted this.....day of February, A. D. 1952.

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# Supreme Court of the United States

October Term, 1951.
No. 443.

UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

EFROIM SPECTOR.

*Appellee.*

## PETITION FOR REHEARING.

JOHN W. PORTER
for
MARGOLIS & MCTERNAN.
112 West Ninth Street,
Los Angeles 15, California,
*Attorneys for Appellee.*

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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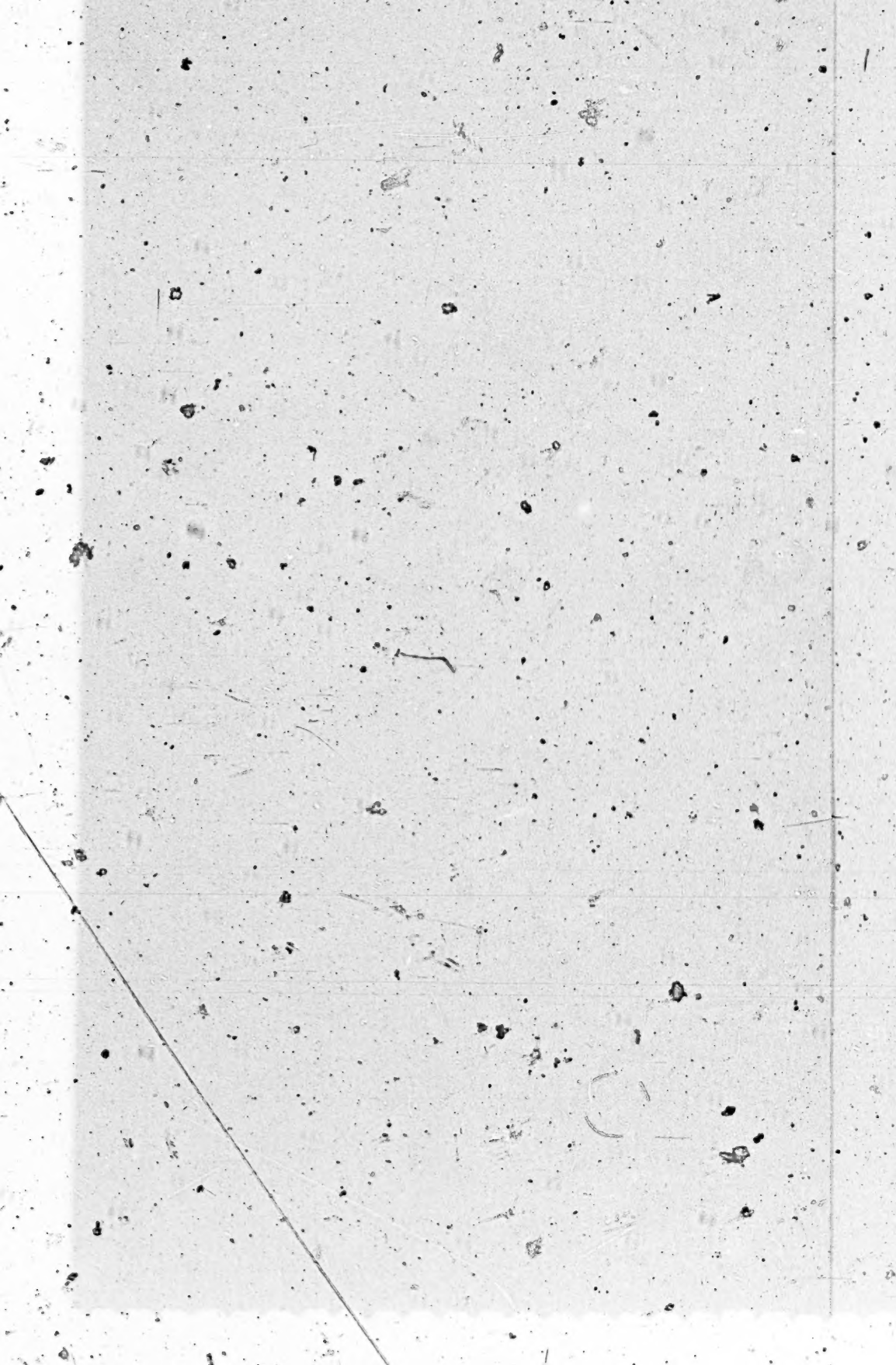
### CASES


| | PAGE |
|---|---|
| Brown v. Aspden's Administrator, 14 How. 25 | 3 |
| Carlson v. Landon, 96 L. Ed. (Adv. Op.) No. 10 | 2 |
| Harisiades v. Shaughnessey, 342 U. S. 580 | 2 |
| Home Insurance Co. v. New York, 134 U. S. 594 | 3 |
| Sacher v. United States, 96 L. Ed. (Adv. Op.) No. 10 | 3 |
| Terminiello v. Chicago, 337 U. S. 1 | 3 |
| United States v. Grinaud, 220 U. S. 506 | 3 |


### STATUTES


| | |
|---|---|
| Rules on Appeal, Rule 20(c) | 1, 2, 3 |
| United States Constitution, Sixth Amendment | 2 |



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## PETITION FOR REHEARING.

Two of the Court's three opinions raise and deal with a grave constitutional issue presented by Section 20(c) on its face which was not briefed or argued by either of the parties upon the appeal. This question is whether the Constitution permits foreclosure from consideration and determination at the criminal trial of the validity of the deportation order which purports to render the alien's presence in the United States unlawful. The importance of the question, as Mr. Justice Jackson's dissenting opinion points out, results from the fact that the deportation order is made by an administrative officer upon a mere preponderance of the evidence in a proceeding which this

Court has held to be civil in character. See *Harisiades v. Shaughnessey*, 342 U. S. 580; *Carlson v. Landon*, 96 L. Ed. (Adv. Op.) No. 10. Thus the statute on its face forecloses trial by the jury of one of the elements of the crime.

The majority opinion expressly reserves decision of this question "until a stage has been reached where the decision of the precise constitutional issue is necessary." We submit that a decision is necessary now.

As the government pointed out in its brief in this case (page 11) there were nearly 3,000 cases, when Section 20(c) was considered and adopted by the Congress, of aliens against whom deportation orders had long been outstanding. Expulsion of this group of aliens was indeed the particular objective of the statute. It must be expected therefore that following this Court's decision in the present case many prosecutions under Section 20(c) will be instituted by the government. Unless the question laid aside by the majority is settled now it is apparent that conflict and confusion as to the issues open to the court and jury at the trial under the statute will prevail. Without doubt trial courts will differ in rulings upon offers to attack the validity of the deportation order. Indeed the trial judge who will sit in this case will want for guidance from this Court upon the point.

In the interests of securing to persons prosecuted under Section 20(c) including the appellee here, the rights which this Court clearly holds are theirs under the Sixth Amendment, so grave a question should be settled before those

rights can be jeopardized. In the interests of orderly administration of justice and because of the importance of clarifying the permissible practice under the statute the question should be briefed and argued now. See *Sacher v. United States,* 96 L. Ed. (Adv. Op.) No. 10.

This Court may and will call for reargument of vital constitutional issues "where doubts are entertained which it is supposed may be removed by further discussion at the bar." *Brown v. Aspden's Administrator,* 14 How. 25. See *Home Insurance Co. v. New York,* 134 U. S. 594; *United States v. Grinaud,* 220 U. S. 506.

Nor are these considerations to prevail only where the Court is evenly divided. Both this appellee, other persons in the same position and the District Courts generally will benefit from the briefing argument and decision of this vital question. There can be no doubt that the issue ultimately will come before this Court for resolution. Authority permits the present decision for which the foregoing considerations argue. *Terminiello v. Chicago,* 337 U. S. 1. They clearly outweigh the accident that this ground was dealt with neither by the Court below nor by the parties.

For all of the foregoing reasons therefore we submit that the Court should now invite analysis and argument by the parties of the constitutionality of Section 20(c) in respect to its foreclosure of opportunity to secure a determination by the Trial Court of the legal and constitutional validity of the deportation order. This Court can then

determine the question with binding authority to the benefit not only of this appellee but of the administration and enforcement of this novel and far reaching statute.

Respectfully submitted,

JOHN W. PORTER
for
MARGOLIS & MCTERNAN,
*Attorneys for Appellee.*

**Certificate of Counsel.**

I certify that the within and foregoing Petition for Rehearing is presented in good faith and not for purpose of delay.

JOHN W. PORTER.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of April, A. D. 1952.

4-18-52—60